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No. 73-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DWIGHT GRIGGS, *Appellant*,

v.

CASKEY ALLEN, Individually and on Behalf of All Others Similarly Situated, *Appellees*,

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DWIGHT GRIGGS, *Appellant*,

v.

AUGUSTINA D. ARMENDARIZ, ET AL., Individually and on Behalf of All Other Women Similarly Situated, *Appellees*.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AS AMICUS CURIAE

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INTEREST OF AMICUS

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE,* is an international labor organization composed

*Letters of counsel for all parties consenting to the filing of this brief have been filed with the Clerk of this Court as required by Rule 42.

of employees of manufacturers of electronic products and equipment, electrical machinery, appliances and products, machine tools and allied products. The IUE has more than 100,000 members who are female.

Testimony and exhibits in three cases to which the IUE is a party, and which are still pending undecided at the trial level, have been extensively cited, quoted and relied upon in briefs in support of appellant. Testimony and exhibits from the record in *Gilbert* v. *General Electric Co.*, U.S.D.C.E.D.Va., Richmond Division, Civil Action No. 142-72-R (for earlier reported decisions relating to procedural issues in the same case see 347 F. Supp. 1058, 59 F.R.D. 267, 5 FEP Cases 197, 986, 989, 5 EPD ¶¶ 8070, 8663, 8664, 8749), now awaiting decision by the district court, have been extensively relied upon in the brief in this Court of General Electric Company as *amicus curiae*, pp. 6-8, 12, 15-27, 40-41, 44-45, 50-51, and to a lesser extent in the brief of appellant (p. 21, fn. 26, p. 27, fn. 38, p. 31, fn. 48). Testimony from the record in *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, CS-26324-72 and *Franklin* v. *Stromberg Carlson Corp.*, Case Nos. CS-27069-72, CS-27071-72, CS-27068-72 has been relied upon in the brief *amicus* filed in this Court by the National Association of Manufacturers.

The *Gilbert, General Railway Signal* and *Stromberg Carlson* cases involve an employer-established temporary disability plan and thus the legal issues arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and state FEP laws, rather than, as here, the equal protection clause. But the court below (App. A, pp. 6-9) based its decision

on a determination that the exclusion of pregnancy-related disabilities constituted discrimination because of sex. And that, too, is the issue in each the *Gilbert, General Railway Signal* and the *Stromberg Carlson* cases.[1]

The IUE is also a party plaintiff in two other cases now pending and not yet decided in the federal district courts presenting the issue under Title VII of the denial of sick benefits for pregnancy-related disabilities: *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y., 73

[1] *Gilbert* v. *General Electric Company*, U.S.D.C.E.D.Va., Richmond Division, Civil Action No. 142-72-R is a class suit brought by the IUE, its Local 161 and 43 female employees, which presents the issue of whether GE discriminates because of sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, by cancelling all temporary disability insurance when a female misses any work due to pregnancy and refusing to provide income maintenance during such absence even though the absence is prolonged by non-pregnancy related disabilities when GE provides such insurance coverage for the first 31 days of any other leave and of layoff and provides income maintenance during absences due to other disabilities. *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, CS-26324-72 and *Franklin* v. *Stromberg-Carlson Corp.*, Case Nos. CS-27069-72, CS-27071-72, CS-27068-72 present issues as to whether the following constitute unlawful discrimination because of sex in violation of the New York State Human Rights Act, N.Y. Executive Law, Art. 15, Sec. 296: requiring a pregnant employee to go on unpaid leave during the latter months of pregnancy and remain on unpaid leave following childbirth without regard to ability to work; cancellation of Blue Cross and Blue Shield at the time employee goes on leave, depriving employee of coverage for prenatal care and delivery unless employee assumes payment of premiums although employer pays all premiums during periods of leave for other disability and covers prenatal and delivery expenses for wives of employees; no income maintenance for absences due to pregnancy-related disabilities or income maintenance for shorter periods than provided for other absences.

Civ. 63;[2] *Eberts* v. *Westinghouse Electric Corporation*, U.S.D.C.W.D.Pa., Civ. Act. No. CA-74-113.[3]

Efforts of IUE to obtain sick pay benefits for female employees date back twenty years. Prior to the enactment of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, and the parallel state fair employment practice statutes, the IUE had attempted through collective bargaining to secure sick pay for pregnancy-related disabilities. Subsequent to EEOC decision No. 71-1474, CCH-EEOC Dec. Par. 6221 (1971), holding that failure to treat disabilities arising out of pregnancy the same as all other disabilities for purposes of sick pay, constituted discrimination because of sex, the IUE undertook a vigorous campaign to persuade the employers with whom IUE bargains to conform to that decision.

As collective bargaining agent, the IUE has during the past two years been engaged in negotiations with approximately 400 employers for the purpose of securing for female employees the right to all the same benefits as other disabled employees for periods of dis-

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[2] *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y. 73 Civ. 63 presents the issue of whether imposing a maximum period of 6 weeks on payment of temporary disability benefits for pregnancy-related disabilities when benefits are payable for other disabilities up to 52 weeks, imposing mandatory maternity leave and excepting tubal ligations from an otherwise all inclusive medical and hospital insurance plan violates Title VII.

[3] *Eberts* v. *Westinghouse Corp.*, U.S.D.C.W.D.Pa. Civ. Act. No. 74-113 presents the issue of whether failure to pay disability benefits for pregnancy-related disabilities, as well as discharging or coercing pregnant female employees to resign, refusing reinstatement following childbirth, cancelling their accrued seniority and pension credits, refusing to allow them accrual of seniority and pension credits, all contrary to the practice respecting other disabilities, violate Title VII.

ability due to childbirth or the complications of pregnancy.

With some employers, the IUE has been completely successful.[4] Still other employers have entered into standby agreements with the IUE making retroactive to the date of the signing of the agreements of rights of employees with respect to sick pay for periods of absence due to childbirth or other pregnancy-related disability should the courts in cases involving other employers make a final resolution of the issue in favor of pregnant employees.

IUE's lack of success as to other employers has resulted in the filing by IUE, its affiliated locals or members of charges with the Equal Employment Opportunity Commission, hereinafter called EEOC, and state fair employment practice agencies and the filing of suits in the federal district courts, alleging that various policies and practices of employers in singling out pregnancy for special treatment constitutes unlawful sex discrimination in violation of Title VII or similar state law.

As the foregoing indicates, the IUE's interest is primarily in the private sector, rather than the public

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[4] E.g., Employers agreeing to pay temporary disability benefits for pregnancy-related disabilities in the same amounts and for same duration as for other disabilities: Plans with 26 weeks' maximum duration: Central Industries, Chandler, Ind.; Lawrenceville Industries, Lawrenceville, Ill.; TRW, Inc., Philadelphia, Pa.; plans with 13 weeks' maximum duration: Airco Speer Carbon Graphite, St. Mary's, Pa. ($55 but not in excess of 70% average weekly earnings); Cooperative Services, Inc., Detroit, Mich. ($70 to $130); Duncan Electric Co., Lafayette, Ind. ($35 to $50); Elcon Systems, Inc., Detroit, Mich. ($70 to $130); and ITT Electrical Optical Products Division, Roanoke, Va. ($50).

sector. All of the cases in which IUE is involved arise under Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e or similar state legislation, rather than under the Fourteenth Amendment. It is therefore possible that the instant case could be decided by this Court on grounds which would not effect the interpretation and application of Title VII to the cases to which IUE is a party. However, the judges below framed the issue in the case in terms of a sex discrimination standard which might be equally applicable under both Title VII and the Fourteenth Amendment. The position briefed by appellant and by the various *amici* who support appellant, similarly intertwines the two. It is for this reason that the IUE has determined to state its views on this case to this Court.

OPINIONS BELOW

The opinion of the three-judge district court which decided the case below (App. A, pp. 1-18, of Jurisdictional Statement) [5] is reported at 359 F. Supp. 792. The dissenting opinion of Judge Williams (App. A, pp. 19-28) is officially reported at 359 F. Supp. 801.

QUESTION PRESENTED

Whether a statute denying disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's disability is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the statute is part of a comprehensive state disability

[5] All references to App. A are to Appendix A to the Appellant's Jurisdictional Statement.

insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT

The suit below was filed by Carolyn Aiello, Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo and San Francisco Waitresses Union, suing on their own behalf and on behalf of a class composed of all women residing in California who, but for the fact that their disability is due to illness or injury caused by or arising in connection with pregnancy, were or would be entitled to receive disability insurance benefits from the State of California, pursuant to the California Unemployment Compensation Disability Act (App. pp. 4-5).[6] The Director of Human Resources Development of the State of California, the official charged with the state-wide administration of the California Unemployment Compensation Disability Act, was named as defendant (App. A, p. 5). The complaint alleged that § 2626 of the California Unemployment Insurance Code, which contains the language excluding pregnancy-related disabilities, violates the equal protection clause of the Fourteenth Amendment (App. A, p. 11).

Because the complaint requested an injunction restraining the enforcement of a state statute, a three-judge district court was convened pursuant to 28 USC §§ 2281 and 2284 (App. A, p. 2).

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[6] Only Carolyn Aiello sued originally in the federal district court. The other plaintiffs initially filed a petition for a writ of mandate in the California Supreme Court, which was removed at the request of the Attorney General of the State of California from the state to the federal court and consolidated with the *Aiello* suit (App. A, p. 2, fn. 1.

The complaint alleged and defendant did not in his answer deny, the following facts:

Two million California women are presently insured under the California State Disability Insurance Plan, which is financed by a mandatory contribution of approximately one percent of their earnings each pay period (App. A, p. 5). As a result of § 2626 excluding pregnancy-related disabilities from coverage, over 200,000 women for years were denied benefits to which they would otherwise be entitled (App. p. 6).

Every nonwork-related disability, with the sole exception of pregnancy-related disability, is compensable under the state disability insurance laws. Thus compensable disabilities include illness or injury arising from sex change operations, attempted suicide, circumcision, prostatectomies, alcoholism, and cigarette-caused lung cancer (App. A, p. 2).

The plaintiff Aiello in 1972 lost time from work from June 21 to July 20, 1972 as a result of surgery necessitated by an ectopic pregnancy (App. A, pp. 6-7).

The plaintiff Armendariz is a 29 year old married woman who is the sole support of herself and her eight month old son. She lost time from work from May 9 to May 28, 1972 due to a miscarriage (App. A, pp. 7-8).

The plaintiff Johnson lost time from work from May 22 to July 10, 1972 due to a tubal pregnancy which required surgery to save her life (App. A, p. 9).

The plaintiffs Aiello, Armendariz and Johnson each filed claims for State Disability Insurance Benefits which were denied solely because of the pregnancy exclusion contained in § 2626.

The plaintiff Jaramillo, at the time suit was instituted, was a 21 year old woman who was eight months pregnant and except for her husband's educational expenses, was the sole support for herself, her husband and her expected child (App. p. 10). In her complaint she alleged she planned to continue to work until her child was born and to return to work as soon thereafter as her doctor permitted because her family had no other means of support (App. A, p. 10).

The court below granted the plaintiffs' motion for summary judgment and held that the challenged California statutory provision excluding pregnancy-related disabilities from benefits due for all other disabilities violated the equal protection clause (App. A, p. 17). An injunction was issued enjoining the defendant from denying benefits in reliance on § 2626 of the California Unemployment Insurance Code and requiring the defendant to consider and grant the claims of the individually named plaintiffs without regard to the pregnancy exclusion (App. A, p. 18).

While the suit was pending in the district court and unknown to the court or the litigants, the California Court of Appeals for the Second Appellate District construed § 2626 of the California Unemployment Insurance Code as not excluding from state disability benefits, disabilities arising from complications of pregnancy. *Rentzer* v. *California Unemployment Insurance Appeals Board,* 32 Calif. App. 3d. 604 (May 29, 1973). Under this decision the plaintiffs Aiello, Armendariz and Johnson were entitled by statute to disability benefits. The brief for appellant (p. 7) asserts that based on the *Rentzer* decision, the plaintiffs Aiello, Armendariz and Johnson have now been paid the disability benefits which they claimed and that only plaintiff Jaramillo has not been paid benefits.

Also, on October 1, 1973, § 2626 was amended, effective January 1, 1974 so as to make state disability benefits payable except in case of absence due to a normal childbirth and recovery therefrom, Assembly Bill 809, quoted in the Jurisdictional Statement, p. 7, fn. 7.

SUMMARY OF ARGUMENT

Critical to the achievement of equal pay and nondiscriminatory job opportunity for female workers is the elimination of the employer's freedom to force long periods of absence from employment based on pregnancy. The protection of women workers from unwanted separation from the work force on account of child bearing, although in theory assured by the rationale of *Cleveland Board of Education* v. *LaFleur*, Nos. 72-772, 72-1129, decided January 21, 1974, in practice requires that employers be subject to the incentive not to take advantage of temporary disabilities by needlessly imposing long absences. The California law requiring the payment of temporary disability benefits affords the incentive in all instances of male temporary disabilities.

I. The historical background of the California temporary disability insurance program and the context in which that program has been amended by the California legislature establish that the exception of disabilities arising from normal childbirth was based on unfounded sex stereotyped concepts of women and their weak political and economic bargaining power. Prior to the adoption by the California legislature in 1946 of the original temporary disability legislation in California, there had been a uniform history both in Europe and in this country of treating disabilities from childbirth as within the coverage of statutory temporary disability insurance programs.

Beginning with the inclusion of coverage of time lost from work because of normal childbirth as a sickness on the same basis as other sicknesses in the workers sickness insurance act adopted in Germany in 1883, the European countries during the late 1800's and early 1900's adopted similar legislation treating normal childbirth as a sickness for purposes of temporary disability insurance. Early legislative efforts in the United States followed the same pattern.

Industry in this country opposed adoption of a temporary disability program as part of the state or national social security program. Instead, industry beginning in the 1920s adopted a fringe benefit program which paralleled European social security in all respects except for failure to include coverage of pregnancy-related disabilities on the same basis as other disabilities.

The first state act, that of Rhode Island, adopted in 1942 contained no provision dealing with pregnancy as such, and the Rhode Island statute was improperly administered to pay benefits to all pregnant women throughout pregnancy without regard to disability. The only federal legislation, the Railroad Unemployment Insurance Act, defined sickness to include a day of disability due to pregnancy. The Civil Service Act, as administered by the Civil Service Commission, treats persons absent from work because of pregnancy-related disabilities as entitled to accrued sick pay. EEOC and state FEPs, courts, and arbitrators have ruled that failure of private employers to treat childbirth and after disabilities from pregnancy the same as other temporary disabilities for purposes of disability benefits constitutes unlawful discrimination because of sex.

II. The language and purposes of the California Unemployment Insurance Code would embrace pregnancy-related disabilities but for the express exception contained in the statute. Childbirth, even when it is routine and planned, is a sickness or illness within both the lay and medical use of the term illness. Having regard to the purposes of the legislation, pregnant workers are equally, if not more, in need of income maintenance while disabled from work than other employees. Cost is not properly a basis for sex-based classification. But if cost were properly considered the estimates made by supporters of the law are grossly overstated and rest on experience under a mandatory leave system which does not furnish any basis for predicting how long women will be absent if free to work as long and return as soon as medically certified. Insurance practices have been shaped by stereotyped concepts of the behavior of pregnant women and hence cannot be relied upon to justify the California legislation.

III. The California exception of disabilities due to normal childbirth constitutes a classification because of sex without any state interest justifying this classification except cost. Hence the exception is unconstitutional under principles announced by this Court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Reed* v. *Reed*, 404 U.S. 71 (1971); and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

ARGUMENT

INTRODUCTION

This brief *amicus curiae* has a twofold purpose. Preliminarily, to place to California disability statute in comparative perspective and to draw the legal inferences that inhere in that background. See pp. 18-46

infra. Second, and more basically, to draw upon the IUE's knowledge of this subject gained in its collective bargaining capacity and in the litigation it has brought on behalf of its members, primarily the *Gilbert*, *Avery* and *Franklin* cases (described at p. 2-3, supra), and all of which are pending at the trial level, to supplement the medical and economic data and legal arguments before the Court, and to correct misleading or mistaken statements concerning the records in those cases contained in the briefs of the appellant and the *amici* supporting its position, most particularly the General Electric Company. The essence of the IUE's overall position is stated in the brief *amicus curiae* of the AFL-CIO. Thus, in developing the second point addressed herein, the theory of the Federation's argument will be followed, referred to, and supplemented (just as that brief cross references to this one with regard to the record in the cases to which the IUE is a party).

The issue here presented is the key to whether discrimination in employment by state action can be legally erased through constitutional principles barring irrational classification based on sex. The array of *amici* on each side warrants analysis of why both labor and management deem the instant issue so important. Arrayed with the appellant we have the giants of American industry and the associations which represent them: American Telephone and Telegraph Company, General Electric Company, United States Chamber of Commerce, National Association of Manufacturers, Merchants and Manufacturers Association. Although not present with a brief in this Court, General Motors Corporation[1] and Westinghouse Electric

[1] *Gregg* v. *General Motors Corp.*, USDCSDNY, 73 Civ. 63.

Corporation [8] are litigating the issue under Title VII of disability pay on an insurance basis [9] for their female employees disabled by pregnancy and childbirth.

The women in the shops have likewise filed charges of discrimination because of sex based on denial of sick pay for pregnancy-related disabilities on a scale unprecedented [10] as compared with efforts to secure equal pay or promotions, although the latter issues superficially seem to involve more money and more basic long term impact.

Management is aware that the payment of sick pay during pregnancy is the key to equal pay and promotion. As pointed out to this Court in its *amicus* brief in

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[8] *Eberts* v. *Westinghouse Corp.*, USDCWDPa., Civil Action No. CA-74-113.

[9] The lack of a true insurance basis is emphasized because GM does in fact pay up to 6 weeks temporary disability benefits in instances of pregnancy-related disabilities whereas up to 52 weeks is paid for every other type of disability. While the 6 weeks is probably adequate for the vast majority of cases, the plaintiffs Grogg and Callahan had exhausted their six weeks benefits as a result of absences due to complications early in pregnancy, from which they recovered and returned to work before childbirth but had no benefits available when they were later absent due to normal childbirth.

[10] More than 500 such charges have been filed by or on behalf of women represented by the IUE. The court in *EEOC* v. *AT&T*, 365 F.Supp. 1105, 6 FEP Cases 643, 645, 658 (U.S.D.C.E.D.Pa. 1973) noted that the Communications Workers of America had been engaged in processing similar charges for its members. Two such cases brought by the Communications Workers are now pending undecided in the district courts. *Communications Workers* v. *Illinois Bell Telephone Co.*, U.S.D.C.N.D.Ill. E.D., Civ. Act. 73-C-959; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, U.S.D.C.N.D.Ga. No. 18328.

Cleveland Board of Education v. *LaFleur*, Nos. 72-777, 72-1129, filed earlier this term, pp. 8-10:

> In its efforts to secure equal pay and promotions for its female members, IUE has had to counter the employer's traditional attempts to justify paying females lower wages than males and denying females higher paying jobs on the ground that females were less valuable as employees than males because of the repeated and lengthy absences of females from the labor force in connection with child bearing and child rearing. These same employers have been, to an undetermined extent, responsible for the transient qualities of the female labor force because they forced women out of jobs when they became pregnant, terminated all their seniority rights and often kept them out for a number of years thereafter by refusing to hire women with young children." (Footnotes omitted.)

See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971) where this Court held that refusal to hire women with pre-school age children constituted sex discrimination within the meaning of Title VII.

But a decision that the equal protection clause or Title VII bars employers from refusing to employ women during pregnancy or after childbirth when they are medically able to work is not self enforcing. Only if sick pay is due for the periods off the payroll will women employees have a workable method of protecting themselves against the enforced absences for childbirth by which employers traditionally made them transient workers and then refused them equal pay and promotion because their transiency made them less desirable employees. While in California the temporary disability plan is financed entirely by a tax on the earnings of employees, in most of the United

States the employers in whole or in part bear the cost of the temporary disability benefits. If it costs employers sick pay to send women who are pregnant home and keep them home, employers will follow medical standards rather than outmoded taboos and stereotypes.[11] A pregnant woman who is disabled for her regular job but able to perform other work, will be offered by her employer the opportunity to perform other jobs just as today the employer assigns a right-handed tool and die maker with a broken right arm to answering the phone at full pay rather than send him on sick pay.

The reliance by industry upon women's absence for child bearing as justifying paying them unequal pay was evident during the 18 year struggle of labor to get Congress to enact the Equal Pay Act, 29 U.S.C. § 206 (d). Bills for equal pay were first introduced in Con-

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[11] In the *Stromberg Carlson* case (see p. 3, fn. 1, *supra*) a witness called by the employer, Nurse Mary Lou Sansing, testified that the company rule of requiring women to go on leave at the fifth month of pregnancy was due to men being upset at the sight of a pregnant woman in the factory (Tr. 881). In the *Gilbert* case, General Electric Company's Labor Relations Counsel, Thomas F. Hilbert, Jr., testified that allowing a woman to work after six months presented problems of accidents, efficiency and reluctance of other workers to work with her (Tr. 472-473) but on cross examination admitted that his testimony was based on "my impression of life in the GE Company" (Tr. 532) and could not remember a single report of any such problem having ever reached him (Tr. 533). See Prentice Hall, Personnel Management-Policies and Practices, Report Bull. 25, June 8, 1972, p. 458, reporting on a survey of employers, which stated that "in 35% of responding companies, the policies spell out how long a pregnant employee can continue working. Of those firms, 6 months is the most commonly-mentioned cut-off date, with 7 to 7½ months a close second. Several office firms set an 8-month deadline. A number of plants say 4-5 months."

gress in 1945,[12] reintroduced in 1947,[13] 1962,[14] and 1963,[15] and finally the Equal Pay Act was enacted in 1963. Many representatives of industry supported an amendment proposed by Congressman Findley of Illinois (H.R. 6060, 88th Cong., 109 Cong. Rec. 9217, May 23, 1963), which would have permitted unequal pay for males and females where the differentials were based on "ascertainable added cost" which would arise, said the Congressman, ". . . from the undisputed fact that women are more prone to homemaking and motherhood than men. No one of my acquaintances would want to change this fact, but it is one that enters into personnel costs. It will necessarily be considered by management in establishing wage and salary policies." 109 Congressional Record, House 9205 (May 23, 1963). Industry witnesses referred to maternity benefits as adding to the costs of employing women.[16] Congress rejected this amendment, thus expressing its intent that the employer should bear the costs of maternity benefits without discriminating against its women employees by compensating them on a lower basis than male employees.

It is evident on analysis that the increased cost industry fears is not the cost of the benefits themselves

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[12] S. 779, 1178, 79th Cong.

[13] H.R. 1584, 2483, 81st Cong.

[14] S. 1502, 2494, H.R. 11677, 87th Cong.

[15] S. 1552, H.R. 298, 88th Cong.

[16] Fred Edwards, General Manager of Industrial Relations, Armstrong Cork Co., Lancaster, Pa., Hearings before the Senate Subcomittee on Labor and Public Welfare, 88th Cong. 1st Session on S. 882 and S. 910, April 2, 3 and 16, 1963, p. 148; statement of William Miller for the Chamber of Commerce of the U.S., placed in record April 2, 1963, *id.* 69, 71; statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co. on April 16, 1963, *id.* p. 142; statement of William Miller, *id.*, p. 71.

but of the increased pay for women if their services can no longer be underpaid on the basis of their absences for childbirth. After all the average American woman has not more than two babies [17] and works 22 years.[18] What is the cost to industry of disability pay for two normal pregnancies per 22 years of work life going to amount to? And in California it is paid for by contributions only from workers who through bargaining representatives support the decision below.

I. THE HISTORICAL BACKGROUND AND THE CONTEXT IN WHICH THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE WAS AMENDED TO PROVIDE A TEMPORARY DISABILITY INSURANCE PROGRAM APPLICABLE TO ALL DISABILITIES EXCEPT THOSE PREGNANCY-RELATED AND LATER AMENDED TO COVER COMPLICATIONS OF PREGNANCY, ESTABLISH THAT THE ADOPTION OF THE EXCEPTION CONSTITUTED DELIBERATE DISCRIMINATION AGAINST WOMEN, INCLUDING APPELLEES, BECAUSE OF THEIR SEX.

A review of the history of the coverage of pregnancy-related disability under temporary disability plans and the context in which California adopted the exclusion leaves no doubt but what the exclusion in California reflected a combination of stereotyped con-

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[17] In 1972, the birth rate in the United States was 2.025 babies per couple. See the Scripps-Howard News Service release, "Birth Rate Dip Already Changing U.S. Society," by Ann McFeatters, carried in the Washington Star-News, March 5, 1974, p. A-3, cols. 1-8, middle of page.

[18] The average woman has borne her last child by the age of 30. A woman marrying at age 20 has a worklife expectance of 25 years if she has just one child, 22 years if she has two children, 20 years if she has three children, and 17 years if she has four or more. After losing husbands, widowed, divorced or separated women generally return to the labor force. Such a woman at age 35 can anticipate another 28 years at work. U.S. Dept. of Labor, Women's Bureau Bull. No. 272-1960, Handbook on Women Workers, 1969, pp. 7-8.

cepts of women and the weak political and economic power of women wage earners. The exclusion was based on just such notions as the plurality opinion in *Frontiero* blamed for our statute books becoming "laden with gross stereotypical distinctions between the sexes." *Frontiero* v. *Richardson,* 411 U.S. 677, 685 (1973). The historical background shows the uniform inclusion for almost a century of pregnancy-related disabilities in the social security systems of Europe as an integral part of temporary disability programs, and an initial copying of that pattern in the United States in the first state temporary disability law.

In the years since the California State Disability System, with its pregnancy-related disability exception, was originally adopted, subsequent legislation and administrative rulings have made even clearer that failure to include all disabilities arising from childbirth equally with other disabilities discriminates because of sex.

California is one of the five states which have state temporary disability laws providing for the maintenance of income of employees during periods of temporary disability. Three of these systems expressly include to varying extents pregnancy benefits: Rhode Island (General Laws R.I., § 28-4-8), New Jersey (N.J. Stat. Ann. § 43:21-25) and Hawaii (4 Hawaii Rev. Stat., Title 21, Chapter 392). At the time this suit was begun only California and New York, by statutory language, excluded employees absent from work due to pregnancy-related disabilities from benefits. The New York State Human Rights Commission has ruled that the New York State Human Rights Act, 18 McKinneys Consol. Law of N. Y. Ann., Art. 15, makes

it unlawful for employers to refuse to pay to employees disabled by pregnancy the same disability benefits as are paid for other disabilities. *Armbruster* v. *Crouse-Irving Memorial Hospital,* N.Y.S.D.H.R. Case No. CS-28495-72, decided February 27, 1974. So for all practical purposes all states having temporary disability laws require benefits to be paid for pregnancy-related disabilities excepting only California. It was the exclusionary language in the California statute which the court below held unconstitutional.

Coverage of Pregnancy-Related Disability in Other Countries

Since Bismarck in the last quarter of the 19th century used governmentally administered systems of social security to unify Germany,[19] and European nations promptly copied, income maintenance during nonoccupational illness or injury, including income maintenance during absences from work due to childbirth, dating in Germany from 1883,[20] has become an accepted feature of the social security systems in the industrialized world except the United States.

In contrast to the United States where disability insurance is not yet a generally accepted form of social

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[19] U.S. Senate, 83rd Cong., 1st Sess., Rep. No. 6, Pt. 1, Retirement Policies and the Railroad Retirement System, Report of the Joint Committee on Railroad Retirement Legislation pursuant to S. Con. Res. 51 and 56, p. 18; William Lloyd Mitchell, Social Security in America, U.S. Dept. HEW, Social Security Agency, Bureau of OASI (1962), p. 5.

[20] Grant M. Osborn, Compulsory Disability Insurance in the United States (pub. for S. S. Huebner Foundation for Insurance Education, 1958), pp. 41-42; U.S. Dept. of H.E.W., *Social Security Programs Throughout the World,* 1971 (US GPO 1971), p. 71; William L. Mitchell, *Social Security in the USA,* U.S. GPO 1962, p. 5.

security, disability insurance was the first fundamental form in Europe:

> Sickness disability insurance is a basic form of social insurance in European countries and in many other countries throughout the world; it was one of the first forms of social insurance to receive widespread recognition and adoption. Stemming from the voluntary efforts of workers themselves in a variety of workers' guilds and fraternal orders, sickness insurance became firmly established as part of the social insurance program.[21]

The 1883 German sickness benefits statute did not treat a disability arising out of pregnancy or childbirth any differently from any other sickness except to make mandatory the payment of the usual sickness benefit for a minimum period of at least three weeks following childbirth.[22] For any longer period of disability due to pregnancy the female employee was entitled to the same sickness benefits as any other employee for the same maximum period of 13 weeks.

In 1888 Austria, in incorporating existing sick funds into a national sick insurance system, prescribed a model constitution for a sick fund which provided a maximum of 20 weeks benefits and specified:[23]

> "In cases of normal childbirth, the sick benefit shall be continued for four weeks; if the case con-

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[21] Charles I. Schottland, *The Social Security Program in the United States* (Appleton-Century-Crofts; 2d ed. 1970) p. 149.

[22] Law concerning sickness for workers, June 15, 1883, No. 1496, published in Reichs-Gesetzblatt 1883, No. 9, p. 73.

[23] Henry V. Harris, Workmen's Insurance in Austria, reprinted from the 24th Annual Report of the U.S. Commissioner of Labor, Washington, 1911, pp. 251-253, Art. II, § 3.

tinues longer, then benefits shall be paid up to the maximum above specified" [20 weeks].

Similar legislation was adopted in Sweden in 1891, Denmark 1892, Norway 1909, England 1911, Switzerland 1911, Italy 1912, Netherlands 1913 and Greece 1922. Today 68 countries have such legislation.

The publication, *Social Security Programs Throughout the World, 1971,* U.S. Dept. of Health, Education and Welfare, Research Report No. 40 (U.S. GPO 1971) shows in an elaborate two-page chart for each nation in the world, arranged alphabetically, the various programs for that nation, grouped under the five major groups of social security: in the first row, old age; in the second row, temporary disability; in the third row, injury; in the fourth row, unemployment; and in the fifth row, family assistance. The provision for income maintenance during disabilities due to childbirth is part of the temporary disability program. The introductory pages of the report describe the programs for temporary disability as follows (p. viii):

> One reason for grouping in a single branch the several kinds of benefits shown together in the second row is that each deals in one way or another with the risk of temporary incapacity. Moreover, in the most countries where such benefits are provided, all of them are usually furnished as part of a single system with common financing and administration. The majority of countries provide medical care services for sickness and maternity as an integral part of their sickness insurance system, and link such benefits directly with the provision for cash benefits.

Early Legislative Efforts in the United States

In the United States, during the early 1900's, organized labor attempted to secure state laws requiring employers to insure their employees against loss of income during illness, including loss of income during pregnancy. At the time the successful effort to protect against loss of income by occupational injury resulted in enactment of state workmen's compensation laws, bills were introduced in some 15 state legislatures to provide temporary disability insurance.[24] A committee of the American Medical Association cooperated with American Association for Labor Legislation in drafting a model health insurance act which would have required all insurance companies to provide for their insured members certain specified benefits, including provisions for various maternity benefits, among which was partial income maintenance for females who lost wages because of absences due to pregnancy. Grant M.Osborn, *Compulsory Temporary Disability Insurance in the United States,* op. cit., p. 47. A copy of this model bill is printed in *American Labor Legislation Review, Vol. VI, No. 2,* June 1916, pp. 245-251. The "brief" accompanying this bill stated (*id,* p. 221):

> The payment of a cash benefit equal to two-thirds of wages will enable the wage-earning mother to continue her usual contribution to the normal family expenses for food, rent, heat, and light, even though she is unable to continue industrial employment, either because she is physically incapacitated or because the law, as in several states, compels her to remain away from work for a prescribed period immediately before and after birth

[24] Grant M. Osborn, *Compulsory Temporary Disability Insurance in the United States* (pub. for the S. S. Huebner Foundation For Insurance Education, 1958), p. 47.

of her child. This payment will tend to prevent a lowering of the family standard of living at the time when it is most essential that the mother and baby have all the usual comforts of life.

To the nation as a whole such provision is of greater importance than protection at other times, since the conservation of the life of its future citizens at a most critical period is involved.

The movement in the United States for temporary disability insurance laws during the early 1900's was completely unsuccessful. No state adopted such a law until 1942.

Fringe benefit system in the United States

Employees of major corporations in the United States have been provided, by way of fringe benefits, with all the benfits available under social security in other countries, excepting only income maintenance during periods of disability arising from pregnancy.

The fringe benefit system[25] has been supported by employers and insurance companies in the United States as preferable to governmental social security.[26]

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[25] The fringe benefit system of business and industry as the precipitating factor in the adoption of a statutory system for similar benefits was noted by this Court in *Frontiero* v. *Richardson*. In *Frontiero* this Court (411 U.S. at 679) observed that the paralleling for members of the armed forces was adopted in an effort to attract career personnel on a competitive basis with private business. The message of Governor Warren to the California legislature which preceded its adoption of the temporary disability program indicated that only a small portion of private industry had provided its employees with temporary disability insurance and recommended that the legislature require the extension to all employees. California State Journal, January 23, 1946, p. 28.

[26] Donna Allen, *Fringe Benefits: Wages or Social Obligation?* Cornell Univ., Rev. Ed. 1969, pp. xv, 3-4, 25; Charles I. Schottland, op. cit., p. 150; U.S. Senate, 72d Cong., 1st Sess., Hearings before

In 1925 General Electric Company pioneered with an insurance plan contaning both life insurance and a weekly sickness and accident insurance benefit which paid a scheduled benefit based on rate of wages to employees disabled from work by nonoccupational sickness or injury, excluding pregnant women.[27] The plan was originally non-contributory. When GE expanded the plan and made it contributory, the women employees were not offered participation. Explaining the exclusion of women, then President Gerald Swope stated, "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."[28] In 1928 the General Motors Corporation adopted a disability plan which included provisions

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[27] Select Committee on Unemployment Insurance pursuant to S. Res. 483 on October 19, 1931, Testimony of Gerard Swope, President of General Electric, p. 28; *Self-Government: Swope Plan to Keep Business Under its Own Control*, Business Week, p. 1, Business Bourse, N.Y., 1931, pp. 22, 60-61.

[28] The General Electric Annual Report for 1928, pp. 16-17 (*Gilbert* record, Plaintiffs Exh. 44A). The failure of the GE plan to cover pregnancy-related disabilities is attacked as sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e, in *Gilbert* v. *General Electric Co.*, U.S.D.C.E.D.Va., Civ. Act. 142-72-R.

[29] David Loth, Swope of GE: *Story of Gerard Swope and General Electric in American Business* (Simon Schuster, New York 1958), p. 155; Gerard Swope, Management Cooperation with Workers for Economic Welfare, *The Annals of the American Academy of Political and Social Science*, vol. 154, pp. 131, 132 (March 1931). The Oral History Section of Columbia University has notes dictated by Gerard Swope which confirm the account appearing in Loth's biography and Swope's speech printed in the Annals. The annual reports of GE continued thereafter to describe the plan as applicable to all men in certain age and service groups but not to all women in the same groups (*e.g.*, General Electric Annual Report for 1928, p. 17.)

for payment of benefits up to six weeks to anyone disabled from work by pregnancy.[29]

Today 64 per cent of the employees in the United States receive as part of their fringe benefit program similar weekly sickness and accident programs except that only 26% are covered for periods of absence due to a pregnancy-related disability and then only for six weeks.[30]

Many of the early plans made no mention of pregnancy. In the first case arising under such a plan in which a woman sought sickness and accident benefits for a period of absence necessitated by normal childbirth, Judge Nathan Cayton, retired Chief Judge of the District of Columbia Court of Appeals, sitting as an arbitrator, upheld the grievance and awarded the sickness and accident benefits. *Washington Publishers Assn.*, 39 LA 159 (1962). The employers argued that

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[29] That the plan, as adopted in 1928, included the same benefits for employees disabled by pregnancy except that the period of payment was limited to six weeks, see Answer of General Motors Corp. to Interrogatory No. 5 on file in *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y., Case No. 73 Civ. 63. In that suit it is alleged that this six week limitation on the payment of benefits for disabilities arising from pregnancy, as compared with a 52 weeks limitation on the period during which benefits are payable for other disabilities discriminates because of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e.

[30] Robert P. Quinn, "Evaluating working conditions in America," *Monthly Labor Review, Vol. 96, No. 11*, p. 32, bot. p. 37 (November 1973). U.S. Dept. of Labor, Bureau of Labor Statistics, Digest of Health Insurance Plans, 1971 ed. (GPO 1972), Vol. 2, devotes a page to the analysis of the insurance provided and whether it includes disabilities arising from pregnancy.

pregnancy is merely a "normal biological function". Judge Cayton stated (at p. 160):

> [T]he contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of "sickness benefits" and "absence due to illness" and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution.
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> * * *
>
> We may properly take "judicial notice" that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during, and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in order to be aware that labor and confinement result in some amount of trauma and debilitation. Such was the situation here, as shown by the physician's report and the testimony of Mrs. N herself. In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalesence; and after an absence of six weeks [3] she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body

[3] Benefits began after the seventh day of "absence due to illness", and the employer does not contend that the five week claim was excessive.

functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to the sickness benefits above described.

For other arbitration awards of sick pay for absences due to childbirth see *Thornapple-Kellogg School District,* 60 LA 549, 561-562, (M. David Keefe, Arbitrator, 1973); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, Arbitrator, 1973).

In other contexts, arbitrators have been holding for two decades that absences of female employees because of a disability arising from childbirth or a complication of pregnancy must be treated as an absence for any physical disability. See *National Lead Co.,* 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator, 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in the case of disability due to childbirth and indicating the arbitrator believes that any other rule would discriminate because of sex; *Republic Steel Corp.,* 37 LA 367 (Joseph Stashower, Arbitrator 1961) holding that continuity of service credit must be granted for a period of leave for childbirth as this came within the clause providing continuity of service was not broken by illness; *American Machine & Foundry Co.,* 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vacation, women absent on maternity leave are entitled to vacation.

In order to avoid decisions that pregnancy-related disabilities were entitled to the same benefits as other disabilities, employers began to insert an express exclusion in their plans if they desired to exclude such disabilities.

The comparative cost in this country of the sick pay plans as compared with other fringe benefits and as compared with social security is apparent from the following table: [21]

Employee Benefit Costs
1961-1971
(Annual for Employee)

	1971
Social Security	$372
Insurance (non-govt.)	369
Paid sick leave	81
Profit sharing	86
Paid rest periods	280
Workmen's Compensation	82
Paid holidays	244
Private pensions (non-govt.)	402
Paid vacations	400
Other benefits	228
Total employee benefits	$2,544
Average annual earnings	$8,260
Benefits as percentage of earnings	30.8%

Rhode Island temporary disability statute

Rhode Island in 1942 was the first state to adopt a compulsory temporary disability insurance program.[22] The Rhode Island statutory scheme is similar to the California Unemployment Compensation Insurance plan here involved in that the Rhode Island plan was financed entirely by employee contributions of one per cent of wages to a monopolistic state-administered

[21] United States Chamber of Commerce, Biennial Survey, printed BNA, Daily Labor Report 8/10/72 (No. 156), p. A-12.

[22] Rhode Island Pub. L. 1942, Ch. 1200.

fund. The original definition of sickness provided as follows: "An individual shall be deemed sick in any week during which, because of his physical or mental condition, he is unable to perform any service for wages." [33] In 1946 the definition was changed to read: "An individual shall be deemed to be sick in any week in which because of his physical or mental condition, he is unable to perform his regular or customary work." [34]

The Unemployment Compensation Board held that pregnancy came within this definition and was, therefore, compensable under the law.[35]

Elizabeth Duncan Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits,* New York Law Forum, Vol. 17, No. 2, 1971, pp. 480, 485, describes the experience of the Rhode Island law with pregnancy cases as follows:

> Unfortunately, however, the board did not treat pregnancy like other physical conditions. Eligibility for benefits in cases of pregnancy did *not* depend on actual inability to work as required in the law, but was based upon the existence of the condition of pregnancy. In effect, any time a woman was not working during the entire period of pregnancy, regardless of the reason, she could draw benefits (provided, of course, she met the basic requirements for eligibility).[32]
>
> In addition, the basic requirements for eligibility generally were so loosely drawn that a woman who

[32] U.S. Dept. of Labor, Bur. of Employ. Sec., Rhode Island Disability Insurance Program 41 (July 1954).

[33] Rhode Island Public Laws, Ch. 1200, § 2 (1942).

[34] Rhode Island Public Laws, Ch. 1744, §2 (1946).

[35] Grant M. Osborne, *Compulsory Disability Insurance in the United States* (publ. by S. S. Huebner Foundation for Insurance Education, 1958), p. 115.

voluntarily withdrew from the labor market in January, 1943, after earning fifty dollars a week for the first two weeks of the month, and who became pregnant in January, 1945, could receive benefits of $7.25 a week for 4.6 weeks in January-March 1945, two years after she had withdrawn from the labor market.[35]

[35] Id.

The medical profession in Rhode Island recognized that the original application of the statute to pay benefits throughout pregnancy, irrespective of disability, was unsound. But they condemned as equally unsound the proposed amendment which would have limited benefits payable during a pregnancy—related disability to a shorter period than applicable to other disabilities. In pertinent part the report of the House of Delegates of the Rhode Island Medical Society stated:[36]

> In administering the program, the Board has recognized the condition of pregnancy as a disability compensible under its interpretation of the sickness compensation law. In the initial report from the certifying physician it is required that he attest to pregnancy as a specific disability, whereas he knows that in itself pregnancy is not a sickness or disability and does not necessarily justify absence of the worker from employment throughout the period. It is the conditions arising from pregnancy that justifiably constitute sickness or disability claims which the worker rightfully may make under the law.
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> The proposal now advanced in the form of an amendment before the General Assembly within

[36] "Medical Amendments to Sickness Act", Report adopted on January 25, 1945, by the House of Delegates of the Rhode Island Medical Society, The Rhode Island Medical Journal, Vol. 28, No. 2, pp. 135, 136, 137 (February 1945).

the past few days does not solve the problem, but rather advances what is an unsound principle both medically and from the point of social insurance.

* * *

We recommend that the law as written be correctly interpreted to understand that sickness or disability arising from, or complications due to, pregnancy be compensible in accordance with the provisions of the sickness compensation act.

Sickness caused by pregnancy should not be distinguished from sickness from other causes, and it should be equally compensible.

California temporary disability statute

California became the next state to adopt a state disability law. In his message to the California legislature submitting the bill, Governor Warren stated:[37]

> The purposes of the program were two-fold: First, to reduce to a minimum involuntary unemployment, the suffering caused thereby, and the resulting decline of purchasing power, and second, to avoid the necessity for resorting to costly relief programs.
>
> Unemployment resulting from illness or disability is a risk faced by all workers. Sickness or injury of a worker when nonoccupational in character and therefore not compensable under the Workman's Compensation Act, deprives the worker and his family of their primary source of income, the pay check, at a time when income is most needed.
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> When sickness strikes down the breadwinner, living expenses continue just the same, and, in addition, there is often extra expense occasioned by the illness itself.

[37] California State Journal, January 23, 1946, p. 227.

As originally adopted, payments were made for all disabilities except an injury or illness caused by pregnancy prior to termination of the pregnancy and for a period of 28 days thereafter. § 2626. The only other exception was payments to dipsomaniacs, drug addicts and sexual psychopaths who are confined in an institution. § 2678. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction, ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies and menopause. [38]

The California state disability law is financed entirely by a 1% tax levy on the wages of each employee until a maximum of $85 has been collected each year: §§ 984, 985, 2401. Benefits are paid on a scale graduated in declining ratio to earnings: an employee earning $75 to $524.99 in the highest quarter gets a benefit of $25 a week; an employee earning $1,000 to $1,024.99 in the highest quarter gets $45; an employee earning $2,000 to $2,024.99 gets $85 per week; an employee earning $2,850 or more gets $119 per week. § 2655.

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[38] Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemployment Insurance Code §§ 2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemployment Insurance Code § 2627(c). Appellant also maintains "yardstick" standards and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

Benefits are payable for a maximum of 26 weeks. § 2653. The total amount paid to an employee must not exceed one half of the total wages which the employee received during the base period. § 2653.

Governor Warren in his message stated that the cost estimates made for the program were:

> Based on Rhode Island's actual experience and with allowance for the differences between the Rhode Island law and the law now under consideration for California, the cost in California would be approximately $35,000,000 a year.

The State of California (Appellant Br. p. 11) explains that the Rhode Island experience to which the Governor referred was with respect to costs of the payments which were initially made for pregnancy-related work absences. This indicates that the State of California made a conscious choice between excluding and including payments for pregnancy-related disabilities and chose for reasons of cost to exclude. The whole history of discrimination in employment because of sex is a matter of the employer saving money by paying females less or according them less benefits. Any different treatment of the sexes based on the desire of the employer to save mony is necessaily discrimination because of sex. In War Labor Board decisions which had been issued in the years immediately preceding the enactment by California of the state temporary disability program here involved, employers had repeatedly argued that by reason of absences for childbirth and other reasons it cost more to employ a female so she should be paid less. The War Labor Board uniformly held that this constituted a violation of the governmental policy against discrim-

ination because of sex in respect to equal pay for equal work which was in effect in World War II.[39]

Temporary disability provisions of the Railroad Unemployment Insurance Act

The next temporary disability legislation in point of time and the first federal law providing a temporary disability program was also enacted in 1946, when Congress amended the Railroad Unemployment Insurance Act to provide benefits for periods of absence due to sickness. It defined sickness to include a day of maternity leave.[40]

Prior thereto the Railroad Unemployment Insurance Act had provided benefits only for a day of unemployment due to inability to find work, not a day of unemployment due to being unable to work. The amendment which included the definition of a day of sickness read as follows (60 Stat. 736):

> Sec. 303. The first paragraph of subsection 1(k) is amended by inserting * * * (2) a 'day of sickness' with respect to any employee, means a cal-

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[39] *United Screw and Bolt Co.*, 17 War Labor Reports, 232, 235 (1944); *General Electric Co.*, 28 War Labor Reports, 666, 680, 685-687 (1945). See also pp. 16-17, *supra*.

[40] Railroad Unemployment Insurance Act, 45 USC 351(k)(2), 60 Stat. 736. See Sen. Rep. 1710, 79th Cong., 2nd Sess. reprinted U.S. Cong. & Adm. News 1946, pp. 1316, 1319-1320. The Railroad Unemployment Insurance Act, as amended in 1946 to provide temporary disability pay, gave a pregnant employee not only the same sickness pay for her period of maternity leave, but an additional maternity benefit at the rate of 1½ times the daily benefit rate. 54 Stat. 1494, 1495. This was amended in 1968 to leave her the sick pay during maternity leave but to take away the special maternity benefit. See H.R. 1054, 90th Cong., 2nd Sess. to accompany H.R. 14563, reprinted 1968 U.S. Cong. & Adm. News, p. 1635-1636.

> endar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work or which is included in a maternity period.

In 1968 the foregoing language was amended and the present formulation enacted. The present definition of sickness appears in 45 USC Section 351(k)(2) and reads as follows:

> A 'day of sickness' with respect to any employee means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health.

The reports of the Railroad Retirement Board which administers the Railroad Unemployment Insurance Act, showing the number of recipients and amounts paid, according to "major sickness group" and listing "pregnancy, childbirth, and the puerperium" as one type of sickness group are printed regularly in the Railroad Retirement Board Quarterly Review.[41]

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[41] Figures for 1970-1971 appear in Sickness Beneficiaries Under the RUIA, the RRB Quarterly Review, January-March 1972, p. 9, at p. 13; for 1969-1970 in Beneficiaries under the RUIA in 1969-1970. The RRB Quarterly Review, January-March 1971, p. 17 at p. 20; for 1968-1969 in the RRB Quarterly Review January-March 1970, p. 22. The tables all bear a footnote (1) that they include normal periods of pregnancy and the puerperium for which benefits are paid in addition to disabilities from complications and another footnote that the classification by sickness group is in accordance with the World Health Organization, 1955, Manual of

Civil Service Regulations

The United States Civil Service Commission has always required all agencies to provide the same right to use accrued sick leave for absences due to childbirth or any disability arising out of pregnancy as is provided for an absence from any other disability. The statute providing for sick leave neither defines "sick" nor mentions childbirth or pregnancy.[42]

The Civil Service Commission states in its leave regulations that agencies "shall grant sick leave when an employee * * * is incapacitated for the performance of duties by * * * pregnancy and confinement." 5 CFR § 630.401(b). There is no record of any federal agency

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the International Statistical Classification of Diseases, Injuries and Causes of Death. In these years the median age of recipients of benefits on account of pregnancy, childbirth and the puerperium is 25 and average daily benefits are $12.62 to $12.69, as compared with a median age group ranging from 48 to 57 for the other major sickness groups and an average daily benefit of $10.16 to $11.30. The lower benefits in the non-pregnancy cases are explained by the fact that railroad workers who have more seniority have their sickness payments reduced or recovered because of concurrent entitlement to other social security benefits or settlements for personal injury.

[42] The relevant statutory language is (5 USC 6307):

(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period;

* * *

(b) Sick leave provided by this section, which is not used by an employee, accumulates for use in succeeding years.

(c) When required by the exigencies of the situation, a maximum of 30 days sick leave with pay may be advanced for serious disability or ailment.

failing or refusing to comply with this mandatory Civil Service regulation.[43]

It is only with respect to the definition of the emergencies which justify an advance of sick leave which has not yet accrued that an apparent divergency of practice exists in the federal government.[44] Some agencies expressly require that the same standard govern in pregnancy-related disabilities as in any other disability.[45]

Recommendations of the Citizens' Advisory Council on the Status of Women

In November 1970 the Citizens' Advisory Council on the Status of Women, operating under Executive Order

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[43] See U.S. Dept. of Labor, Womens Bureau Bulletin No. 272, 1960, *Maternity Benefit Provisions for Employed Women*, pp. 24-25.

[44] The reference in the brief of GE as *amicus*, pp. 13, 43-45, is only to the advance of sick leave, *prior* to its accrual.

[45] The EEOC Personnel Manual, Section 911, as supplemented by Guidelines on Advance Leave issued May 25, 1973, provides:

> Requests for advance of sick leave for reasons of pregnancy and confinement should be treated the same as requests for advance of sick leave in other cases of serious disability regardless of the maternity aspect.

The Department of Transportation, Order entitled Absence and Leave, OST 3600.1, 10-12-72, par. 34, provides:

> Requests for advance of sick leave associated with normal pregnancy and confinement usually should be denied. However, in the event of complications arising from pregnancy or childbirth, the approving official must apply standards of judgment similar to those governing granting of sick leave in other cases of serious disability regardless of the maternity aspect.

No. 11, 126, 3 CFR 971[46] after an extensive study, adopted a Statement of Principles with respect to "Job-Related Maternity Benefits." In pertinent part the Council stated:[47]

> Some employers and some State temporary disability systems treat childbirth as a temporary disability and some consider it a "normal physiological condition." The Council concluded that for purposes of employment it is a temporary disability. Economically it makes no difference whether an employee is unable to work at his regular job because of pregnancy or because of hernia, ulcers or any other illness or accident; in any case he or she suffers loss of pay and has extra medical expenses.
>
> The notion that pregnancy is a "normal physiological condition" has been advanced as a reason for denying women benefits provided for temporary disabilities and occasionally as a reason for providing leaves of absence not provided for other disabilities. Since there are no existing systems or guides for giving leave of absence or insurance benefits for "normal physiological conditions", a variety of policies for this special category result. Some of these create an inequity between benefits because of disability, due to pregnancy and benefits because of all other temporary disabilities. A woman about to give birth is temporarily disabled from work, is under the care of a physician, and is usually hospitalized.

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[46] The Council was established on Nov. 1, 1963, by Exec. Order No. 11, 126, 3 CFR 971 (1964), by President John F. Kennedy on the advice of the President's Commission on the Status of Women, and is composed of twenty private citizens who are appointed by the President for indeterminate terms. U.S. Dept. of Labor, 1969 Handbook on Women Workers, at p. 294.

[47] Citizens Advisory Council on the Status of Women, Women in 1970, at p. 20.

The Council considered whether special benefits for maternity not provided for other temporary disabilities are ever justified. Since women are subject to all the other disabilities of mankind, it can be argued that additional benefits are needed for pregnancy. This line of reasoning treats women as a class and ignores individual differences. The essence of the fair employment concept is individual rather than class treatment.

Individual women who are not pregnant and individual men may be absent more in a given period of time because of temporary disabilities than women who are having babies during that period. The 1961 survey of the Civil Service Commission of sick leave usage by Federal employees shows small differences in the percentages of men and women having zero sick leave balances and negative sick leave balances (those who have been advanced sick leave), indicating that the present system is inadequate for a small percentage of both men and women.

Annual Public Health Service Surveys show that women and men lose about the same amount of time from work because of acute disabilities, including childbirth and complications of pregnancy. In 1968, men averaged 5.2 days per year and women 5.9 days per year; in 1967 it was 5.3 and 5.6 days per year.

Giving special treatment for pregnancy will inevitably lead to situations in which men and other women who are suffering from disabilities other than pregnancy will have less benefits than pregnant women. This is not sociologically or economically justified and would be divisive. In addition, in the United States where the employer frequently pays all or part of the cost of such benefits, such policies could very well result in reluctance to hire women of childbearing age.

Guidelines and decisions under Title VII and state Fair Employment Practice Plans

The Equal Employment Opportunity Commission, herein called EEOC, first by decision [48] and later by its Guidelines on Discrimination Because of Sex, 29 CFR 1604.10(b), effective April 2, 1972, construed the prohibition on discrimination in employment because of sex contained in Title VII of the Civil Rights Act of 1964, 42 USC 2000e, as making it unlawful for an employer to deny to women absent because of childbirth the same temporary disability benefits as are paid for absences due to other disabilities. Section 1604.10(b) of the Guidelines reads:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The following states, pursuant to state fair employment practice legislation, have issued guidelines which similarly declare failure to pay to women disabled by pregnancy or childbirth nonoccupational temporary disability benefits on the same terms as are paid for

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[48] EEOC Decision No. 71-1474, CCH—EEOC Dec. ¶ 6221, p. 4282 (March 19, 1971).

other disabilities, to be sex discrimination violating the state FEP legislation:

> Maryland Sex Discrimination Guidelines, Section 8, CCH-EPG Par. 23, 820.08(b), FEP 451:544;
>
> New York State Division of Human Rights, Employment Policies Relating to Pregnancy and Childbirth, Section 15-C(3), CCH-EPG Par. 26,059;
>
> Washington Sex Discrimination Guidelines, WAC 162-30-020(6), FEP 451:1248(a); CCH-EPG Par. 28,574(6);
>
> Wisconsin Sex Discrimination Guidelines, adopted July 10, 1972, FEP 451:1282(a)(B).

To date there have been two federal district court decisions in cases arising under Title VII which have upheld the above-quoted EEOC guidelines and ruled that an employer discriminated because of sex in violation of Title VII by failing to pay sickness and accident benefits to women disabled by normal childbirth. *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 34, 271 (U.S.D.C.W.D.Pa. 1974); *Dessenberg* v. *American Metal Forming Co.*, U.S.D.C.N.DOh.E.D., Civil Action No. C-72-48T, decided by Judge William J. Young on October 3, 1973. And an arbitration award holding that the six-weeks limitation on disability benefits for pregnancy-related disabilities under a plan which otherwise had a 52 week maximum violated Title VII, was enforced by a state court *Goodyear, Tire and Rubber Co.* v. *Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 6 FEP Cases 1069 Court of Common Pleas of Auglaize County, Ohio, Case No. 73-74).

There is one federal district court decision which contains an ambiguous ruling relating to this issue

The ambiguity arises from the fact that it is not clear from the court's opinion whether the plaintiff limited her claim to benefits to a period she was disabled or whether she claimed the right to benefits throughout pregnancy without regard to whether or not she was disabled. Thus the court in *Newmon* v. *Delta Airlines,* 7 FEP Cases 26 (U.S.D.C.N.D.Ga. 1974) stated, at p. 32:

> [T]here is no judicial determination that the regulations, particularly 29 CFR § 1604.10(b), mean pregnancy is a sickness or disability and therefore entitles pregnant women to such benefits as a matter of law as the plaintiff implies. * * * Furthermore, upon examining the actual wording of the guidelines it is not apparent that they actually equate pregnancy with disability or sickness.

The New York State Division of Human Rights has likewise issued a decision ordering payment of non-occupational sickness and accident benefits for pregnancy-related disabilities where such benefits were paid for a wide range of other disabilities. The case arose under the sex discrimination provisions of state F.E.P. legislation. *Armbruster* v. *Crouse-Irving Memorial Hospital,* NYSDHR, Case No. CS-28495-72, decided February 27, 1974.[49]

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[49] The argument in the Brief of GE as *amicus* (pp. 50-51, fn. 49) based on the interpretation during the period 1950-1964 by State Fair Employment Commissions of state statutes as not making exclusion of pregnancy from temporary disability benefits unlawful rests on the erroneous assumption that during this period state fair employment practice acts forbade sex discrimination. Prior to February 8, 1964, when Congressman Smith offered the amendment which put the word "sex" in Title VII (110 Cong. Rec. 2577, Col. 1, 2584, Col. 3), Hawaii was the only state which included a prohibition of sex discrimination in its state fair employment practice act. The Hawaii Act was first approved June 3, 1963, and did not become effective until January 1, 1964. Hawaii L. 1963, Act 180, Sec. 1(b), (c) and (d).

With respect to GE's contention (Br. *amicus* pp. 11-12, 38-43) that Section 1604.10 of the EEOC's Sex Discrimination Guidelines is not consistent with earlier agency positions, we believe there are three answers: (1) EEOC had never prior to the issuance of Section 1604.10 issued any guidelines on this subject and had issued no clear statement on the subject; (2) the statement that pregnancy is unique and not to be equated with other illnesses which was attributed to EEOC by the various commercial reporting agencies occurred in the context of a discharge of an employee because of pregnancy and the EEOC ruled that she had to be given leave whether or not leave was provided for any other illness, rather than in the context of an issue over sick pay;[50] and (3) there is no basis in any

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[50] See for example EEOC Decision No. 70-360, CCH-EEOC Decisions ¶ 6084 (December 16, 1970), where the charging party claimed that the employer discriminated against her because of race in refusing her maternity leave thus treating her as a quit when she was absent because of childbirth. The employer refuted the race discrimination charge by showing he had likewise denied maternity leave to Caucasion employees. The finding that the employer violated Title VII, quoted the disputed November 15, 1966 opinion letter as follows: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be some special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." The issue of sick pay was not involved, but solely the right to return to work following absence for childbirth. The EEOC's position that even though males are never given such sick leave, as a man may lead the full life of a male and never miss work because of sickness, the absence of leave for disability has a disparate effect on females as they cannot lead the full life of a female without missing work because of childbirth.

opinion letter, decision or other statement of EEOC position for assuming that if it had considered sick-pay policies applicable to all disabilities except pregnancy-related it would have held non-discriminatory the denial of benefits for pregnancy-related disabilities.

GE (*amicus* Br. p. 40) quotes two paragraphs which GE describes as setting forth the position of the EEOC in 1966 as it "appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966" (*id,* pp. 39-40; see also p. 12). GE (*amicus* Br. pp. 40-41) states that there is no contradiction of the testimony that "quoted statements from the 1966 letters reflected official EEOC policy during his incumbency as General Counsel" (GE, *amicus* Br. pp. 40-41). Portions of the testimony of Charles Duncan, former General Counsel of EEOC, are set forth in the Appendix, pp. A-1 to A-7 at the end of the brief of GE as *amicus.* Defendant's Ex. 12, to which reference is made in the GE's Appendix, pp. A-2 and A-3, and which is quoted at GE (Br. *amicus* p. 40) consists of unsigned copies of two letters dated respectively November 12 and November 15, 1966 (Defendant's Exhs. 12A and 12B). As appears at Appendix to GE's brief *amicus* p. A-2, Charles Duncan ceased to be General Counsel of EEOC in October 1966. He testified on cross examination that he did not remember signing either the opinion letter dated November 15, 1966, letter quoted by GE (Br. *amicus,* at p. 40, lines 5-13) (*Gilbert* Tr. 568-569) or the November 12, 1966 letter quoted by GE (Br. *amicus,* at p. 40, lines 17-20) (Gilbert Tr. 568-569) and that on the dates November 12, 1966 and November 15, 1966 (*Gilbert* record Def. Exh. 12B) he had ceased to be General Counsel of the EEOC. He stated he did not know if anyone ever signed either letter (*Gilbert*

Tr. 553-554, 571), did not know to what company, if any, either letter was addressed (*Gilbert* Tr. 569), and did not know whether either letter was ever received by any company (*Gilbert* Tr. 569, 571).

When GE has been unable to locate any documentation except carbon copies of letters which were never signed nor sent by their purported author, there can be no basis for finding that EEOC did issue any earlier conflicting rulings. In the November 15, 1966, draft of a letter which was never identified as in fact sent to anyone, the EEOC recited the various exclusions from disability pay so that the exclusion for pregnancy did not in that plan constitute the only exception as is true here.

Finally, of course, this Court dealing in this case with the equal protection clause, has no concern with the validity of the Guidelines except as they demonstrate that the primary agency in which Congress has vested power to correct discrimination because of sex in employment considers that equal treatment requires that pregnancy-related disabilities be treated exactly the same as other disabilities.

II. THE CALIFORNIA STATUTORY PROVISIONS, BY EXCLUDING FROM TEMPORARY DISABILITY BENEFITS FEMALE EMPLOYEES WHOSE INABILITY TO WORK IS DUE TO CHILDBIRTH OR RECOVERY THEREFROM, WHEN SUCH BENEFITS ARE PAID TO MALE EMPLOYEES WHENEVER THEY ARE DISABLED FROM WORK, IRRESPECTIVE OF THE CAUSE, PER SE DISCRIMINATE AGAINST FEMALE EMPLOYEES BECAUSE OF THEIR SEX.

A. The State of a Female While in Labor and Delivery, Even When the Birth Is Entirely Routine and Planned, Is an Illness or Sickness.

Appellant now concedes that the California statute makes benefits available for all disabilities caused by any complication of pregnancy, both as a result of the construction placed on the statute by the California state courts (*Rentzer* v. *California Unemployment Ins. Appeals Board,* 32 Calif. App. 3d 604), and of the amendment effective January 1, 1974 (Appellants Br. p. 7). By definition this leaves, as the only exclusion, women whose period of disability is the time they are in the three processes of childbirth known as labor, delivery and puerperium. It is irrational to exclude childbirth from the category of disabling sicknesses for which sick pay should be paid.

While modern medicine through its use of anesthesia and elaborate new electronic fetal monitoring systems [51]

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[51] For a description written for the lay reader of FMS, as it is known in the medical profession, see *Confessions of a Gynecologist* by Anonymous M.D., Doubleday & Co., 1974, pp. 75-76: "Today's obstetrician is more like an airliner pilot, who still needs his flying skill but has an array of electronic helpers. The pilot has radar to 'see' through darkness and fog; I have available the fetal monitoring systems which continuously record vital conditions in the womb. The baby is connected to a cardiometer by a thin, sterile wire, introduced through the vagina and cervix and harmlessly clipped to the fetal scalp. The impulses of the heart show up visually on a screen and, at the press of a button, can be recorded on a continuous strip of paper—a record of exactly what is happen-

may have camouflaged the historic drama of childbirth, it would be ironic to say that the planned delivery of the medical profession robs childbirth of its character as sickness. Consider childbirth without the miracles of modern medicine. Recall Rudyard Kipling's line, "She who faces death by torture, for each life beneath her breast",[52] or our own Pearl Buck, whose third chapter in the *Good Earth* comes to mind when we think of childbirth in literature. We read how the Chinese wife worked beside her husband until labor began and then got his meal for him before giving birth. Pearl Buck expressed her view of childbirth in these words:

> [W]hen she has a child she goes down into a simple elemental experience * * * which divides that self into another and brings all of life into its simplest primeval terms. * * * Women are cleansed in soul by this return to the elements of death and life that make childbirth * * *.

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ing. At the same time, a fluid-filled tube running from the uterus to the monitor measures and records the frequency, duration, and pressure of each contraction of labor.

"The FMS, as we call it, enables the obstetrician to make tough medical decisions more quickly and with greater assurance. I wasn't exactly flying blind before the FMS, but at times the signs might not be clear. For example, I might be hard put to decide whether a difficult labor should be allowed to continue or whether the child should be delivered by Caesarean section. Much new evidence has accumulated indicating that there comes a point in a prolonged labor, even though seemingly normal, when the child may be damaged: The fetal heart action is depressed during hard labor contractions and this, in turn, reduces the supply of oxygen reaching the infant's brain. If this hard-squeezed distress persists too long the child may be compromised. In some cases the baby may seem quite normal when born, but later may lag in its development and show evidence of mental retardation. On the other hand, a Caesarean is not to be undertaken lightly because, like any major operation, it carries a certain amount of risk, additional pain, a longer hospital stay, and considerable expense."

[52] The Female of the Species, *Rudyard Kipling's Verse*, Doubleday 1940, pp. 364, 365.

> The risk of death in childbirth exalts the woman. She goes down to the gates of death and she comes back triumphant over death.[53]

Isadora Duncan describes her experience wth childbirth as follows:[54]

> Talk about the Spanish Inquisition! No woman who has borne a child would have to fear it. It must have been a mild sport in comparison. Relentless, cruel, knowing no release, no pity, this terrible, unseen genie had me in its grip, and was, in continued spasms, tearing my bones and my sinews apart. They say such suffering is soon forgotten. All I have to reply is that I have only to shut my eyes and I hear again my shrieks and groans as they were then.

Then there is the death of Princess Elizabeth in childbirth in Tolstoy's War and Peace.[55]

That childbirth is still a leading cause of death for American women of child bearing age see Warren M. Hern, M.D., "Is Pregnancy Really Normal?" 3 Family Planning Perspectives, January 1971, pp. 5-8. See the testimony of Dr. Donovan quoted, p. 62, *infra*. Nor is it only the mother who risks death. In 1968 the infant mortality rate in the United States was 21 for 1,000 births.[56]

We anticipate this will elicit a response from opposing counsel that all this shows what a different world we get into when we enter upon the subject of pregnancy and childbirth. But it is a subject that is in the plants today. Employers brought it there by hiring some 33,000,000 women who constitute 38.5 per

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[53] Pearl S. Buck, *Of Men and Women*, John Day, 1941, p. 153.

[54] Isadora Duncan, *My Life*, Boni & Liveright, N.Y., 1927, pp. 194-195.

[55] Leo Tolstoy, *War and Peace, Book IV*, Chapters VII and IX, (1869).

[56] *United Nations Demographic Yearbook 1970*, Table 16, p. 646.

cent of all workers.[57] Our gross national product now requires the continued presence of these women in industry. Industry has forced women into the work place by paying males such low rates of pay, it today takes two paychecks to meet the family budget.[58]

The appellant (Br. p. 31, fn. 48) and GE as *amicus* (Br. pp. 7, 18) quote testimony from the *Gilbert* case for the proposition that neither medical assistance nor hospitalization is essential in childbirth. In quoting Dr. Hellegers[59] to the effect that "labor" in itself

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[57] U.S. Dept. of Labor, "Women in the Labor Force," 1972.

[58] In 1950 according to U.S. Bureau of Census, median earnings of men who headed families, were $3,435, while the BLS Budget for a city worker's family of four was $3,718 in October 1950. By 1970, the budget had risen to $10,646 whereas the median gross earnings of a worker were $6,228 a year. For California workers see fn. 82, p. 93, *infra*. On March 17, 1969 BLS instituted a new system of issuing its periodical cost-of-living figures so that henceforth three budgets will be issued, a lower budget, a moderate budget, and a higher budget. The moderate level budget is a continuance of the prior budget. See BLS Bull. No. 1570-5, *"Three Standards of Living for an Urban Family of Four Persons"* (Spring 1967). It may be that history will record the TV advertising campaigns which built into American workers' minds the necessity for a higher standard of living, at the same time that their wages did not keep pace as the force which drove women out of the home and into the factory.

[59] The medical experts to whose testimony we will here refer are the same ones whose biographical sketches and testimony appeared either in the record in *Cleveland Board of Education* v. *LaFleur*, Nos. 72-777, 72-1129 or the Appendix to the Brief of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as *amicus curiae* in that case. They are: Dr. David Forrest, who was the personal obstetrician of the plaintiff, Susan Cohen, in the case of *Cohen* v. *Chesterfield County School Board*, No. 72-1129, who also testified as an expert witness called by the plaintiffs in the *Gilbert* v. *GE*, U.S.D.C.E.D.Va., Richmond Division, C.A. No. 142-72-R case on July 24, 1973 and whose testimony

does not require medical assistance and all the doctor does in "labor" is to hold hands and rub backs and encourage, (Appellant Br. p. 31, fn. 48) appellant overlooks the distinction between the process known as labor which precedes delivery and the delivery itself. Dr. Hellegers described the function of the doctor in delivery as the performance of an episiotomy (Gilbert Tr. 329-331) which he said was routine procedure in the United States (*Gilbert* Tr. 330-331). He explained that the doctor also is necessary for the purpose of suturing the episiotomy or other tears (*Gilbert* Tr. 330-331).

In addition, the brief of GE as *amicus* (pp. 7, 18), argues that the "common" use of "home deliveries by trained midwives" in Europe demonstrates that medical assistance during delivery is not required. Dr. Hellegers testified in the *Gilbert* case that it was his belief that delivery by "lay people" in Britain, Holland and Western Europe is less common than in the United States (*Gilbert* Tr. p. 324) and that in Holland, for instance, midwives have "more obstetrical training than 90 per cent of the American medical profession" (*Gilbert* Tr. 327). In Holland midwives have first of all a nursing degree and then attend one of the Royal

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therein will be here cited, *Gilbert* Tr. ——; Dr. George Wilbanks, Chairman, Dept. Ob-Gyn, Rush Medical College, Chicago, whose deposition as a witness for GE was taken in the *Gilbert* case on April 12, 1973; Dr. Andre Hellegers, Prof. of Ob-Gyn, Georgetown Univ., who testified as an expert witness for the plaintiffs in the *Gilbert* case on July 25, 1973 and in *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, etc., cited *Gen. Ry.* Tr. ——; and *Franklin* v. *Stromberg-Carlson Corp.*, Case Nos. CS-27069-72, etc. in Rochester, New York on June 8, 1973, cited *Stromberg* Tr. ——; Dr. John C. Donovan, Chairman of Obstetrics-Gynecology, University of Rochester Schoof of Medicine, who testified for the employer in *General Railway Signal* and *Stromberg-Carlson*.

Schools of Midwifery for two to three years. "If you are delivered by a midwife in Holland, you have a much better obstetrician than if you are delivered by a regular M.D., American surgeon" (*Gilbert* Tr. 327). Delivery in the home in Europe is occurring less and less. Dr. Hellegers testified on cross examination by counsel for GE (*Gilbert* Tr. 325):

> A. I think the last bastion of home delivery is my own place, I came from Holland, and that has changed from 70 per cent home to 70 per cent hospital in the past 15 years.
>
> * * *
>
> Q. The figures on complications and death and so forth compared favorably with comparable figures in this country, did they not?
>
> A. I would say their figures have always been better than in this country.

On redirect he testified (*Gilbert* Tr. 326):

> Q. Would you suggest why the figures were better than the United States during the period?
>
> A. Oh, yes, for a very simple reason. If you develop a complication at home in Holland they can get you to a hospital faster than, you know, in the United States.
>
> As a matter of fact I used to live across the border in Belgium and deliver babies in Holland. And it took me less time, and my patient less time, to get from my home in Belgium to the hospital and to the delivery room than it took me to get from the intern quarters to the delivery room at Johns Hopkins. I mean there is a hospital every three miles and no city congestion.
>
> But I wouldn't like to try it in Rotterdam or Central Rotterdam. That is where one no longer delivers at home. So it is a question of access to emergency facilities which are infinitely better in Europe than they are here.

Dr. George Wilbanks as an expert witness called by GE in the *Gilbert* case testified (*Gilbert* Tr. 582):

> Now I might say that in England they have what is called a "flying squad", wherein women are delivered in the home by midwives and if something goes wrong, a doctor with blood, instruments and an operating table are in the ambulance and they are rushed to the home so that the patient can be taken care of.

The assertion in the brief of GE as *amicus* (pp. 7, 18, fn. 9) that the "reason" for the trend towards hospitalization for delivery in the United States is in part "to assist in helping with child nursing and to provide for the infant's psychological support" ignores the routine performance of the surgical procedure of episiotomy in all deliveries, which entails anesthesia, suturing and all of the other usual features of surgery which can only be performed in a hospital (see pp. 61-64, *infra*). The testimony of medical experts that only ½ per cent of pregnant women have complications which require hospitalization, to which GE in its amicus brief refers (pp. 7, 19), made very clear that the experts were referring only to hospitalization because of a complication during pregnancy and prior to the hospitalization for labor and delivery which is regarded by the medical profession in the United States as absolutely essential in all cases. Every medical expert to testify in the *Gilbert* case so testified. Dr. Forrest testified that 100 per cent of normal pregnancies go to the hospital when they deliver; even if they are delivered by a rescue squad they still go to the hospital and to the delivery table (*Gilbert* Tr. 88). To the same effect, see Dr. George Wilbanks, GE's expert witness (*Gilbert* Tr. 581-582) and Dr. Hellegers (*Gilbert* Tr. 325).

1. The terms used in the California statute, "illness or injury" are lay terms

The appellant (Br. pp. 8, 11-12, 17) argues that women who suffer no complication of pregnancy but are disabled only by a normal childbirth are properly placed in a class apart from those covered because the purpose of the statute (Section 2601) and its definition of disability or disabled (Section 2626) establish the class as defined by the words "illness" or "injury".

Neither the word illness nor injury is a technical medical term. Dr. Wilbanks, called as an expert witness for GE in *Gilbert* v. *G.E.* testified (*Gilbert* Tr. p. 577):

> Q. What do the terms "sickness" and "illness" mean, medically speaking?
>
> A. I think, medically, it would be similar to "disease." I think I would prefer that "disease" would be the medical term and "illness" and "sickness' would be more lay terms for a similar condition.
>
> Q. Are the terms "disease", "sickness" and "illness" synonymous from a medical point of view?
>
> A. Yes, I think, in general, they would be, although there are some innuendos of illness and sickness. Some lay people use these terms meaning nausea and maybe just a feeling of poor feeling, where I think "disease" as used by the medical person, would be critically defined as a definite condition.

Similarly, Dr. Hellegers testified (*Gilbert* Tr. 243):

> Q. Is sickness a medical term?
>
> A. Well, sickness, I think, is much more of a lay term. It is a word used much more by the laity in terms of the way they feel like illness and sickness.
>
> Disease would be much more the medical or technological term for the conditions that a patient might have.

Explaining, Dr. Hellegers testified (*Gilbert* Tr. 289-290):

A. Well, illness and sickness, I think I have said throughout is something that the patient perceives, so, as you know, a patient may still feel sick in the absence of a disease even—

Q. Yes.

A. I think I said I tend to think of the words, "I feel ill" and "I feel sick", as being perceptions of the person, whereas a disease is something that is diagnosable by a physician as being abnormal.

THE COURT: You mean is subjective and one is objective?

THE WITNESS: That is precisely right. I would use the word, Your Honor, of disease being objectively noticeable and illness and sickness as subjectively a perception of the individual.

Dr. Forrest emphasized the discomfort of the patient in his definition of the word disease (*Gilbert* Tr. 13-14):

A. In my own mind I like to break the word "disease" down to the "dis" and the "ease". And the prefix, "dis", meaning to reverse, and I think of it in terms of the patient's, the individual being in a comfortable state, is suddenly conscious of certain stresses that have been placed on the body mechanism and he now becomes diseased or uncomfortable, sufficient to seek out or ask for medical attention.

Having regard to this definition, all women who deliver would be diseased. In this regard, Dr. Forrest testified (*Gilbert* Tr. 89):

Q. So when you said 90 to 95 per cent of the pregnant women suffer no disease, you did not go back to your definition of disease, did you?

A. No. If I relate to discomfort aside from the normal state of wellbeing I probably did not relate that.

Q. 100 per cent of them have suffered discomfort, did they not?

* * *

THE WITNESS: If you are referring to the fact that they required anesthetic for the time of the delivery to relieve the pain and discomfort, the actual delivery process and the episiotomy, or they required medication and/or anesthetic during their labor, then the answer would be yes.

As with all systems of classification, the function to be served by the classification results in a definition useful for one purpose but irrelevant for others. Dr. Andre Hellegers testified in the *Stromberg* case (Tr. 144):

Q. How do you define disease?

A. Well, there have been several major definitions. One would be a statistical deviation from what is normal.

A second set of definitions would say that a diseased state is a state in which one cannot function. And a third definition would say that it is a state which if not corrected would lead to further complications and possibly ultimately death.

And he elaborated further in his testimony in the *Gilbert* case (Tr. 242-243):

A. We need a whole set of approaches to the definition, and I don't know which of these to define by myself. Some people would define disease or abnormalcy as a statistical deviation from an average.

Under that kind of definition, for instance, hypertension might be a disease, hypotension would be a disease; but it is a vague definition because it presumes something like normal tension, and so when you statistically deviate either towards the low or high side from that number then you might say that is abnormal, that is a disease.

A second approach would be to try to define disease in terms of ability to function. To show some of the handicaps of going that route it might mean that somebody who had, say, a Jewish nose in Nazi Germany and was consequently unable to function

in Nazi Germany would have a diseased nose. That leads to certain, you know, ridiculous lengths, but there are people who talk about ability to function. A third kind of definition would have it that disease is that which, if not corrected, would continue leading to further debility and ultimately to death. I suppose that is the commonest definition.

A fourth and more modern type of definition has come through the World Health Organization's definition of health which says that it is not just an absence of disease but the presence of a total sense of physical, psychological, and social well-being. So that conversely, you might then define disease as the absence of a sense of total physical, psychological or social wellbeing.

The World Health Organization, Manual of the International Statistical Classification of Disease, Injuries and Causes of Death, 1955 rev. ed. classifies normal delivery as a disease assigned the digit 600. See brief of AFL-CIO, as *amicus curiae,* p. 10. See also fn. 41, pp. 36-37, *supra.*

2. The normal character of the delivery affords no rational basis for exclusion from benefits

The attempt by the State of California to draw a line between the normal and the abnormal in pregnancies and to deny benefits in the normal but not the abnormal is irrational. As we shall show (pp. 61-64, *infra*) it is routine medical practice to perform an episiotomy in every delivery in the United States. Is an episiotomy normal? California regards delivery by Caesarian section as abnormal and hence entitling the pregnant employee to benefits. When two women go to the delivery room and one doctor decides to perform a Caesarian and the other performs an episiotomy, is there any rational basis for paying benefits to the one rather than the other? The word normal does not

serve to define disease. See Dr. Edmund A. Murphy, "A Scientific Viewpoint of Normalcy" *Perspectives on Biology and Medicine, Vol. IX, No. 3,* Spring 1966, p. 333, quoted in brief of AFL-CIO as *amicus* at pp. 13-15. Dr Murphy, pp. 333-334, 346-357, states:

> To anyone considering the subject for the first time, it is a matter of some astonishment that so much is written about the normal, so little about normalcy. The former relates to the practical guidelines which the medical practitioner may use, the latter to the kind of "abstractions" with which the theologian, the philosopher, the educator, the politician, or the lawyer would like to deal.
>
> * * * All too often the ill-considered pronouncements of a "medical expert" are borrowed for use in such areas as education and politics and his most casual comments can provide substrate for generations of speculative philosophy.
>
> The medical specialist most likely to come to grips with the problem is the academic pathologist. It is strange that the physiologist and the anatomist whose declared area of expertise is the normal never seem to consider the problem at all—whether through inadvertence or through a feeling that the question is trivial, is not clear.
>
> * * * We may accept as normal anything which discharges its proper function. This is at best a slight improvement. It is possible for an organism to function very well as a whole in the face of grave abnormalities, for example blindness. Overcompensation by other mechanisms may make good most or all of the deficiency. Yet we cannot be content to say blindness may well fall within the range of the normal. The other defect in the approach is that it leaves undefined the normal function of an organ, and if we think of it as determined by the environment and subject to ruthless selection, we are again faced with all the problems of the polarity of evolution. Beyond this the scientist cannot go.

> * * * If the philosopher can decide, in useful working terms, not in abstractions, how the normal is to be identified, then the methods of science and the refinements of statistical analysis may help to crystallize definitions in a form appropriate for general use. "Normal" may be used in other senses by experts in other fields, and if they wish to enlist the help of science, then it is appropriate that each of them should provide his own definition.

Dr. Hellegers in his testimony, emphasized that the meaning of disease depends entirely on the purpose for which the definition is used (*Stromberg* Tr. 144, supra). Under cross examination by employer counsel, Dr. Hellegers referred to Dr. Murphy's article (*Gen Ry.* Tr. at pp. 224-229):

> Q. Now then is there a medical reason for distinguishing between paying for a person who is absent from work because of sickness, illness or disease and a person who is absent from work because of a pregnancy?
>
> * * *
>
> A. Well, I suppose that paying somebody money because they are diseased is something that one does for a purpose and I don't know what the purpose is, industry would have to tell me. I guess to pay their doctor's bills or something of this order.
>
> Q. Would you agree, doctor, that there is a difference in the underlying—medically there is a difference in the underlying reason for the absence, one being caused by a medically recognized disease, sickness or illness?
>
> A. Yes.
>
> Q. And the other being caused by a medically recognized normal physiological function?

A. Well, I don't see why in the normal state one should be paid for being absent. I don't medically see what the reason would be for being paid for being absent when one is normal.

MR. CARNEGIE [Hearing Examiner]: Let him finish.

A. I would think that if one were in both cases debilitated in one way or another and couldn't perform I would see there might be a reason for paying both in terms of the handicap or the hope they would come back to work as soon as possible in the non-debilitated state.

* * *

Q. Now I'm going to paraphrase it. It's the best I can do at the moment. It had to do with whether there was any medical reason for making a distinction between giving a person money who was absent because of a childbirth or pregnancy reason and a person who was absent for or because of a disease, sickness or illness?

A. My answer to that is no, there is no difference provided in both cases debilitation is present.

Q. By debilitation what do you mean?

A. Inability to work.

* * *

A. If I start off with a normal person not pregnant and a normal person pregnant and both of them develop debilitating conditions I see no reason to treat them differently.

Q. Would you decipher the terms as you're using it, debilitating?

A. Unable to perform the tasks that they are supposed to perform.

A. That was, incidentally, one of the definitions I gave of disease I think earlier on. I gave one as deviation from the statistical norms. I gave one as a condition which if not treated would inevitably lead to degeneration and death and all three definitions have been argued notably by a man

named E. J. Murphy in "Prospectives in Biology and Medicine" in a Spring issue of 1966. He is a physician, geneticist and statistician who was trying to arrive at how do we come at a definition of health and disease.

Dr. Hellegers further elaborated on these definitions in his testimony in the *Gilbert* case (Tr. 242-243, p. , supra.

Virtually every birth in the United States involves the surgical procedure of an episiotomy, a cutting of the tissue between the posterior opening of the vagina and the rectum to provide an opening large enough for the baby's head to pass through. Dr. John A. Donovan, Chairman of the Department of Obstetrics and Gynecology, Strong Memorial Hospital, Rochester, New York, testifying as an employer witness in *Franklin* v. *Stromberg-Carlson* on April 18, 1970 before the New York State Division of Human Rights, Complaint Case No. CS-27069-72, pp. 139-142, testified:

> Q. Can you explain why an episiotomy would be normal on term size babies?
>
> A. In the normal physiologic situation this is one place where nature fails. The skin, the tissues surrounding the opening to the birth canal is seldom able to dilate enough to permit a baby to come through without the woman sustaining a tear which in the normal course of events heals, but a clean surgical incision is generally thought of as preferable to a tear.
>
> Q. An episiotomy is a surgical procedure, is that correct?
>
> A. Yes, it is cutting.
>
> * * *
>
> Q. This involves some sort of a suture after the surgical cut is made?
>
> A. Right.

Q. What kind of a suture? You use the same type of suture you use in other operations?
A. Generally cat gut.
Q. Do you use that in other operations too?
A. Yes.
Q. This involves some form of anesthesia, does it?

* * *

A. The average practice in Rochester, I think certainly the average practice at Strong Memorial would be to use a local anesthetic.

* * *

Q. Historically did the tearing itself cause hemorrhaging on occasion?
A. On occasion.

Anesthesia for delivery often presents the problems for the anesthetist that are common in the use of anesthesia when a patient arrives in the hospital as a result of injuries in an accident. There is no time to prepare the patient. She may have eaten a hearty meal within the hour. Asphixiation by aspiration of her gastric contents is therefore one of the commonest causes of maternal death. (*Stromberg Carlson* Tr. 143). Dr. Donovan testified (*id.*):

Q. Would you indicate the type of situations that give rise to fatality in delivery itself?
A. Yes, aspiration of the gastric content, vomiting and then aspiration, swallowing the wrong way down the lung, sometimes unwise anesthesia, anesthesia that would be necessary, that would be one example.

Again at *Stromberg-Carlson* Tr. 148-150, Dr. Donovan testified:

Of course, as I previously indicated, I think that labor is disabling and part of the disability of the

labor has to do with the tissue trauma of delivery and the stretching that goes on which many times is more traumatic than is the episiotomy. Indeed, that's the purpose of the episiotomy, to cut down the natural trauma connected with this admittedly disabling phenomenon.

Q. Does the tearing of the tissue ever arise to the level that you regard it as a disease?

A. Yes.

Dr. Forrest described an episiotomy as follows (*Gilbert* Tr. 29):

> An episiotomy is that incision which is made between the posterior opening of the vagina and the rectum. And this incision releases the muscular—muscles and fibers, tissue, and allows a larger opening so that when the baby's head is delivered there is— it makes it easier for the baby's head to be delivered.
>
> * * *
>
> In most instances, particularly with the first baby, if you don't make it nature will make it for you and a tear is much harder to repair than an incision.

The consequences which might ensue if instead of an episiotomy a woman had a tear which was not repaired, were described by Dr. Hellegers as follows (*Gilbert* Tr. 332):

> the most severe form might be a formation of a fissure which would be an opening or tract between the vagina and the peritoneal, and a lesser—a relaxation of the perineum, possibly loss of control of the sphincter, control in the rectum, or worse—well, not worse but alternatively, uneven healing of the two edges of the wound so that one is constantly sitting on a knob with the pain and discomfort of constantly sitting on a knob.

Both Dr. Forrest (*Gilbert* Tr. 29-32, 77-79, 89) and Dr. Hellegers (*Gilbert* Tr. 329-332) testified that an episiotomy was routine in all deliveries in the United States.

Whether or not the opening is caused by a surgical incision or a natural tear, it must be repaired, and is done so with absorbable sutures under anesthesia. The sutures and anesthesia are the same kinds that are used in other surgical procedures on both men and women, and the procedure can only be performed by a licensed doctor or nurse midwife. (See pp. 61-22, *supra*).

The State of California does not suggest that there are any other instances of disability which involve the use of a surgical procedure which are not covered by the disability benefits provision.

3. The voluntary character of the pregnancy affords no rational basis for exclusion from benefits

In the California Unemployment Insurance Code, § 2626.2, as amended effective January 1, 1974, the adjective "involuntary" is used to qualify the noun "complication". The argument of appellant (Br. pp. 8, 19, 25-26) and of GE (*amicus* Br., pp. 6-7, 20-22) is that normal childbirth is not involuntary because no woman gives birth involuntarily, due to the availability of contraceptives and abortion to prevent or terminate an unwanted pregnancy.

There is general agreement that even today in the United States a very large percentage of pregnancies are unplanned and a lesser percentage unwanted.[60] Twenty-two percent of first births occur within the

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[60] See also Fredelle and Rona Maynard, Birth Control Accidents, *Woman's Day* (Fawcett Publications, Inc.) Feb. 1973, pp. 16,18.

first eight months of marriage.[61] Other studies indicate that there are 750,000 to more than 1,000,000 births annually in the United States that are unwanted.[62]

The report of the Commission on Population Growth and the American Future (March 1972, Signet, p. 163) states:

> According to estimates developed in the 1970 National Fertility Study conducted by the Office of Population Research at Princeton University, 44 per cent of all births to currently married women during the five years between 1966 and 1970 were unplanned, 15 per cent were reported by the parents as having never been wanted.
>
> * * *
>
> In 1970, women with no high-school education reported that 31 percent of their births in the preceding five years were unwanted at the time they conceived.[63]

A look at statistics on abortion and the numbers of infants given up for adoption show that a substantial number of unwanted pregnancies still occur.[64]

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[61] U.S. Dept. H.E.W., Public Health Service Vital and Health Statistics, Series 22, No. 12, DREW Pub. No. (HSM) 72-1009, October 1971.

[62] Larry Bumpers and Charles F. Westoff, "The Perfect Contraceptive" Population", 169 Science 1177 (1970).

[63] 1970 National Fertility Study conducted by Office of Population Research, Princeton University. See Norman B. Ryder and Charles Westoff, *Reproduction in the United States*, 1965 (Princeton: Princeton University Press, 1971).

[64] "All of the [contraceptive] methods used today are imperfect in some glaring way . . . . The results show that in an average year use failure rates were as follows: Pill, 4 percent; IUD, 7 percent; condom, 16 percent; diaphragm, 18 per cent; withdrawal, 21 percent; rhythm, 28 percent; foam, 29 percent." Leslie Aldridge Westoff and Charles F. Westoff, *From Now to Zero; Fertility, Contraception and Abortion in America*, at 68-69 (1971). See also 293-294.

The evidence presented at the *Gilbert* trial established that due to the limits of medical technology and various moral and religious considerations of doctors and patients alike, effective contraceptive methods are not available to all women in the United States.

Doctors Forrest and Hellegers agreed that the pill was the most effective contraceptive method presently available (*Gilbert* Tr. 54, 272-273, 323-24) but went into greater detail in describing the reasons why this allegedly foolproof (GE Br. *amicus* pp. 7, 20) method was not available to all women. Moreover, Dr. Wilbanks agreed that "there are some women whom nothing could ever work on. There are certain persons who perhaps can not use anything" (*Gilbert* Tr. 628).

The pill should not be prescribed for any women with hypertensive disease, diabetes, varicosities, or muscular disease (*Gilbert* Tr. 49), nor for any tumor of the breast or uterus, even benign, or any form of heart disease, disease of the circulating cardiovascular system, liver or veins, at 274. Other women, for whom the pill may be prescribed initially, may be unable to tolerate continued use of this drug because of rapid weight gain, the development of thyroid disease, high blood pressure problems or nausea.[66]

GE (*amicus* brief, p. 20) in attributing to Dr. Hellegers the statement that considering the way the population uses the pill, there will be "one pregnancy in 100 years of exposure to intercourse" (*Gilbert* Tr. 272) failed to state that this statement was made solely with

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[66] Leslie Aldridge Westoff and Charles Westoff, *From Now to Zero: Fertility Contraception and Abortion in America*, pp. 92-100 (1971), add to the above list of those warned not to use the pill, women with a family history of phlebitis.

reference to the failure rate of the pill. Dr. Hellegers emphasized that the pill was not an answer to unwanted pregnancies because, of even those women whom doctors allow to take the pill, at least half of them stop taking it within three years of the time they start (*Gilbert* Tr. 322).[66]

Complications from use of the pill may be serious and even fatal. Accepted medical opinion exists that taking the pill involves the risk of thrombo-embolitic phenomena or blood clots, which can be fatal (Tr. 629-630).[67] The assertion in GE's brief as *amicus* (p. 20),

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[66] This statistic does not include those women who intentionally decide to stop using a contraceptive in order to conceive (*Gilbert* Tr. 322).

[67] Reporting of complications arising from pill use is presently limited to the more drastic consequences such as thromboembolitic disease. The incidence of minor complications such as ovulation-suppression following termination of pill medication is not currently being recorded (Forrest, Tr. 87-88).

One article on contraceptive technology made the following comment on oral contraceptives after noting the increased risks of thromboembolic disease in women taking the pill:

> Other side effects which are less well understood relate to biochemical or metabolic abnormalities observed with varying frequency in pill users. About 50 have been described thus far, and it is possible that the hormones contained in the pill produce biochemical, structural or functional alterations in every organ and tissue . . . the contraceptive effect of the pill results from interference with the extremely delicate and complex hormonal mechanism which control the menstrual cycle, ovulation and the reproductive process. This elaborate control system is thrown out of balance, and contraception is achieved by means which can be compared to using a sledge-hammer to kill a mosquito.

Oscar Harkavy and John Maier, "Research in Reproductive Biology and Contraceptive Technology: Present Status and Needs for the Future.", *Family Planning Perspectives*, Vol. 2, No. 3, at 6 (June 1970).

that the pill is commonly regarded as safer than childbirth, was shown by Dr. Hellegers to be meaningless. He said (Gilbert Tr. 319-320):

> [B]efore you are allowed to go on the pill you have to have a physical examination. If you have cancer, liver disease, high blood pressure, heart disease, a whole slew of diseases, you are not allowed to play on the pill team, see? * * * so you have to play on the non-pill team * * * so only well people play on the pill team. The sickies play on the other team. And then you wind up with statistics that show the wellies do better than the sickies * * * The answer is in-built into the way we put people on the pill. So while it is true that those who take the pill do better than those who have childbirth, the statement is true, it gives a false impression because we have pre-screened them and allowed only the healthy ones to play on the pill team * * * so the statement is both true and meaningless, if I can put it that way.

The use of other methods of contraception is also limited by either their effectiveness or their appropriateness for certain kinds of women.[68] (*Gilbert* Tr.

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[68] The IUD has a 2-7% use failure rate (Hellegers, Gilbert Tr. 323-24), but many doctors will not insert IUDs for a woman who has never had a child or a miscarriage, or one who had undergone a previous Caesarian section. (Hellegers, Gilbert Tr. at 274-5, Forrest, Gilbert Tr. 52). The 20% explusion rate was cited as an index of the numbers of women for whom the contraceptive method is inappropriate (Hellegers, Gilbert at 275). Dr. Wilbanks conceded that the IUD did involve a certain risk of uterus perforation (Transcript at 638). Less effective methods of contraception such as the diaphragm, condom, jellies, and creams, involve less risk to the users than do the pill or IUD (see Gilbert Tr. 638). Dr. Hellegers and Wilbanks agreed that the morning after pill, the newest contraceptive alternative, was too new for everyone to know if there was significant risk involved. Dr. Hellegers indicated that it should not be considered as an accessible method of contraception for women at the present time. (Gilbert 630, 273).

275). For Catholic women, and other individuals for whom contraception creates a religious dilemma, the only acceptable contraceptive is the rhythm method; this method is considerably less effective than all other methods and in order to use it a women "must have fairly regular menstrual periods and they must adhere very strictly to abstinence during the fertile period." (Wilbanks, *Gilbert* Tr. 628).

Abortion is now recognized by many as the failsafe for women whose contraceptive methods have not been effective. There are a variety of medical reasons to advise against abortion even for those individuals who had no moral objection to the procedure. Even when abortion is performed by a licensed physician in a hospital setting, complications of infection of the uterine tract, perforation of the uterus with a subsequent necessary hysterectomy, or psychological problems may occur.[*]

In addition to these medical reasons which could cause a physician to advise against abortion, abortions as a practical matter are unavailable in many non-urban areas in the United States (*Gilbert* Tr. 278). The difficulty in obtaining abortions results in large part because many members of the medical professions will not perform abortions under any circumstances,

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[*] See also Dr. Hellegers' testimony that abortions would be medically contraindicated for women who have congenital heart disease, and, "contrary to general belief, one prefers not to do an abortion in a severely psychiatrically disturbed," (p. 276). Moreover, Dr. Hellegers indicated that: (*Gilbert* Tr. 276).

> there is beginning to be some considerable question as to whether the first pregnancy should be aborted at all. That is to say, there is beginning to be some considerable evidence that to terminate a first pregnancy considerably increases the chances in subsequent pregnancies of premature delivery.

and no Roman Catholic hospital in the United States (one-third of all private hospitals) will perform abortions on their premises.[70] (Hellegers, *Gilbert* Tr. at 277-278).

Hence, there is more than enough evidence for the Court to find that pregnancy may be an accidental occurrence for more than just a few women. Not only are there women for whom effective methods of birth control are either medically or religiously impossible to use, but the ultimate failsafe of abortion, even after the landmark decisions in *Roe* v. *Wade,* 93 S.Ct. 705 (1973), and *Doe* v. *Bolton,* 93 S.Ct. 739 (1973), is not yet a realistic alternative for women in many non-urban areas across the nation.

Moreover, even in the most carefully planned and desired pregnancies, certainly one could not claim that the resulting disabilities are voluntary, any more than would be a broken leg which resulted from a much anticipated skiing trip.[71] Dr. Forrest testified that the woman who becomes pregnant does not voluntarily bring on disabilities that may arise in any different manner than the person who drinks alcohol voluntarily brings about the condition of alcoholism. He also asserted that if the fact that excessive smoking contributes to lung cancer and emphysema is accepted and

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[70] A very large number of Baptist hospitals and those administered by orthodox Jews similarly refuse to allow abortions to be performed in their facilities (*Gilbert* Tr. 279-280).

[71] In the case of disabilities arising from complications due to pregnancy, it could not be argued that the woman voluntarily chose to undergo such conditions. Moreover, even in the normal, voluntary pregnancy the disability period due to childbirth can be distinguished from the disability period due to elective cosmetic surgery.

known by a patient, and the patent continues to smoke, the respiratory disabilities he suffers are no less voluntary than those experienced by a woman who chooses to bear a child. (*Gilbert* at 48-49).

Dr. Hellegers testified that women do not engage in sexual intercourse in order to acquire the disabilities of a pregnancy any more than people who drink do so in order to develop alcoholism or individuals who ski do so in order to break a limb. Moreover, he indicated that the injuries suffered by a man who becomes involved in a street fight are more predictable than the disabilities that may befall the women who becomes pregnant (*Gilbert* Tr. 280-281).

Most women who get pregnant but who have never given birth to a child are unaware that the medical profession in the United States today assumes as a routine matter that nature has not provided women with an adequately large birth canal but rather that a surgical incision through muscles controlling the birth canal will be necessary to avoid tears even more severe than the contemplated surgical incision (See *Gilbert* Tr. 29-32, 77-79, 89, 329-332).

A woman not aware that getting pregnant would involve her in this surgical procedure can hardly be said to have voluntarily incurred it by getting pregnant any more than it can be said every woman getting pregnant on whom a doctor decides to perform a Caesarian section voluntarily brings on herself a Caesarian section.

Most women who get pregnant for the first time undoubtedly hope that they will be one of the lucky ones who go through labor and childbirth painlessly. The testimony of the medical experts in this case, with Dr.

Wilbanks testifying for GE (*Gilbert* Tr. 587) mentioned instances of women not disabled by childbirth for longer than the few hours of labor and delivery. Dr. Hellegers testified that he had seen women give birth without having been aware that they were pregnant (*Gilbert* Tr. 332). Dr. Wilbanks testified that women who had delivered had walked out of the delivery room (*Gilbert* Tr. 587).

A woman aware that women sometimes go through pregnancy, labor and delivery without any disability and believing her own history of exercise and healthy living would place her in the same class, cannot really be said to have voluntarily brought on herself any disabling conditions which she suffers. Rather, what GE regards as "normal" disabilities attendant on childbirth may indeed be diseased conditions which would not have occurred if she was truly healthy.

Other courts and arbitrators in conformity with the decision below have uniformly rejected the allegedly voluntary character of pregnancy as justifying the denial of benefits.

In holding unconstitutional the denial of unemployment benefits to pregnant women, the Supreme Court of Washington stated (*Hanson* v. *Hutt*, Wash. Sup. Ct. No. 42806, December 20, 1973), DLR 1/9/74 (No. 6), p. A-8 at p. A-9:

> Next, appellant urges that pregnant women cause or contribute to their own unemployment by the voluntary act of becoming pregnant. Assuming arguendo that pregnancy is voluntary, this does not mean that unemployment resulting therefrom is necessarily voluntary. While a woman may want to become pregnant, she may not, and often does not wish to become unemployed as a result thereof.

Recognizing that child bearing is culturally an inherent part of a woman's life, the Tenth Circuit pointed out that the assertion by the state that she could not have the right to work and be pregnant because she voluntarily got herself into that state, penalized her for being a woman. *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773, 774 (10th Cir. 1973): In *Buckley* the court stated:

> The trial court's attempted distinction between discriminatory and non-discriminatory regulations as being whether the condition involved is one which was involuntary must be rejected. The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground.

Similarly, in *Thornapple—Kellogg School District*, 60 LA 549, 560 (M. David Keefe, Arbitrator, 1973), the voluntary character of pregnancy was held no defense to a claim for sickness and accident benefits because a woman would thus be forced to remain barren or suffer loss of benefits. The arbitrator stated:

> Equally repugnant is the proposition that conception is controllable and results from voluntary acquiescence of the affected individual. The very substance of this argument would obviously not apply to cases of rape and would be a matter of unresolvable contention whenever assertion was made that control was essayed . . . but failed to prevent conception. Copulation implicitly is predictive of conception. Its inspiration derives out of the second most compulsive and universally imbedded drive built-in the psyche of all sentient life forms, the first being survival and the second reproduction of the species.

* * *

> Unnatural imposition of celibacy as a condition of employment * * * would insure dimunition of our human resources beyond, by far, the goal of population control and imperil continuation of the civilization which, through human effort, has thus far evolved in this nation."

4. Courts and administrative agencies in a wide variety of contexts have held that the state of a woman during labor and normal delivery is a sickness or illness

The courts have repeatedly rejected the argument that because childbirth was normal it hence was not a sickness.

In the *Queen* v. *Wellings,* 3 Q.B. Div. 426 (the Law Reports 1877-1878), the deposition of the principal witness in a rape case was offered. Under the statute (11 & 12 Vict. C. 42, S. 17(1)), the deposition could only be admitted if the witness was "so ill as not to be able to travel". There was no medical evidence introduced. The husband of the principal witness reported his wife was momentarily expecting to deliver. The argument for the prisoner was almost verbatim the principal defense argument urged here by G.E. as *amicus.* The report of the case quotes the following as argument of counsel for the prisoner:

> The case shows that nothing except pregnancy operated to prevent the deponent from attending the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have in fact been unable to travel, such inability was not within the statute.

The decision of Lord Coleridge is reported as follows (at 428):

> We all think this conviction should be affirmed. Pregnancy may be a source of such illness as to

render the witness unable to travel and be an illness within the statute.

The above decision by Lord Coleridge was cited and followed in an early case involving the discharge of a school teacher for pregnancy. Under the statute she could not be discharged for an absence due to temporary illness. The court held the absence for pregnancy was an absence for a temporary illness and reinstated her. *People ex rel Peixotto* v. *Board of Education,* 82 Misc. 684, 144 N.Y. Supp. 87 (Sup. Ct. 1913), *rev'd.* on other grounds, 145 N.Y. Supp. 853 (App. Div. 1914). The Court stated (82 Misc. at 694, 144 N.Y. Supp. at 93):

> It is pure sophistry to argue, as does the learned counsel for respondent in his brief, that maternity is an indication of health, and therefore cannot be said to cause "serious personal illness". The same argument was urged in the *Queen* v. *Wellings* (3 Queens Bench Division 426) by the counsel for the defendants in that case; but it was overruled by the Court of the Queen's Bench.

In both the recent decisions holding that the denial of sick pay to pregnant women violated Title VII, the courts held normal childbirth to fall within the category of sickness. In *Dessenberg* v. *American Metal Forming Co.,* U.S.D.C.N.D.Oh., E.D., Civil Action No. 72-487 the court stated:

> If one penetrates the euphemisms used by the defendant, its staff, and its attorneys, it appears from the record that sick leave is granted to dry out drunken employees, and to those suffering from the abuse of tobacco, although it is refused to a pregnant woman. Such a practice of rewarding those who abuse their bodies, while punishing

ones who, to use defendant's own words, are "performing a normal function of their body (sic)" paints a rather unpleasant picture of those who are asking this Court to approve their conduct. The Court is not inclined to do so, feeling that alcoholism is at least as voluntary and deliberate as pregnancy. If sick benefits are available for one, they should be for another.

The Court also believes the guidelines of 29 C.F.R. Secs. 1604.1 through 1604.10, particularly the last section, require the Company not only to provide a maternity leave for women which ensures them a similar position when they return to work but also requires the Company to provide sick pay to the same extent that sick pay is provided for such other temporary disabilities as alcoholism, or, as the defendant delicately puts it, "dehydration and malnutrition."

To the same effect see *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 34 (U.S.D.C.W.D.Pa. 1974); *Goodyear Tire and Rubber Co.* v. *Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 6 FEP Cases 1069, Court of Common Pleas of Auglaize County, Ohio (1973); *Bravo* v. *Chicago Board of Education*, 345 F.Supp. 135, 4 FEP Cases 994, 998 (N.D. Ill. 1972); *Washington Publishers Assn.*, 39 LA 159 (Judge Nathan Cayton, arbitrator, 1962); *Clio Education Assn.*, 61 LA 37, 41-42 (James McCormick, arbitrator, 1973); *Thornapple-Kellogg School District, supra.*

For cases holding that it constitutes sex discrimination in violation of the Fourteenth Amendment not to apply the same leave policies to employees disabled by pregnancy as are applicable to employees otherwise disabled, see *Bravo* v. *Board of Education of City of*

Chicago, supra, where the opinion noted that "teacher on illness leave are allowed to draw pay for their accrued 'sick pay' days; pregnant teachers are not" and directed that an order issue providing that "for purposes of sick pay * * * the Board will be directed to treat maternity leaves as leaves due to illness;" *Williams* v. *San Francisco Unified School District,* 340 F.Supp. 438, 445, 4 FEP Cases 498, 504 (N.D. Calif. 1972); *Heath* v. *Westerville Board of Education,* 345 F.Supp. 501, 4 FEP Cases 1002 (S.D.Oh. 1972); *Monell* v. *Dept. of Social Services, City of New York,* 4 FEP Cases 883, 884, EPD ¶7765 (U.S.D.C.E.D.N.Y. 1972).

B. The Purposes of the California Statutory Disability Insurance Law Afford No Basis for Excluding Pregnancy-Related Disabilities on the Ground That They Are Costly To Cover or That They Are Not Sudden Unexpected Disabilities Because the Statute Excludes No Other Disabilities and Such Exclusion Is Inconsistent With the Basic Purpose of the Law

The purpose of the California temporary disability statute is set forth in the statute as follows (§ 2601):

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

The inclusion of pregnancy-related disabilities is within these two purposes equally as much as the other disabilities covered.

No aspect of the work scene in America makes the American woman feel so strongly that she is the victim of discrimination because of her sex as the denial of disability benefits when absent for childbirth. Her sense of discrimination is repeatedly acerbated by the fact that it is usually males who, on a large scale, are recipients over long periods of time of disability benefit checks as a result of injuries in fights, whether drunken brawls or hot-tempered disputes, alcoholism, drug abuse, injuries from automobile accidents while driving recklessly or under the influence of alcohol, sports accidents and analogously caused disabilities. Most women workers today are hard pressed to make ends meet even when they receive regular earnings. Such a woman cannot understand why males so disabled should draw checks but she is not eligible when, as she sees it, she is engaged in the socially approved conduct of bringing a child into the world. See testimony of Arlene Avery, *Gen. Ry.*, April 19, 1973, pp. 81-82, 85-86.

This sense of the incongruity of paying benefits for alcoholism but not for childbirth was shared by Judge Young when he ruled that sick pay must be provided to women disabled by pregnancy "to the same extent that sick pay is provided for such other temporary disabilities as alcoholism, or, as the defendants delicately put it, dehydration and malnutrition." *Dessenburg* v. *American Metal Forming Co.*, U.S.D.C.N.D.Oh. Ed, Civil Action No. C-72-48-T, Judge William J. Young, October 3, 1973.

California pays disability benefits to every disabled worker, including alcoholics, drug addicts and sexual psychopaths unless they are confined in an institution pursuant to commitment or court order (Section 2678) excepting only women disabled by normal childbirth.

A woman who is not physically able to work because of pregnancy-related conditions has a greater need of sickness and accident insurance than other employees who cannot work.[72] The loss of her source of income may be injurious to herself and her future offspring in a way not possible from loss of income to the non-pregnant employee. Dr. Hellegers testified (*Gen. Ry.* Tr. 160-163):

> Q. * * * Assuming that these are the reasons that industry provides sick pay in cases of absence for temporary illness and accident, is there anything from a medical point of view which would indicate that a distinction should be made between providing income maintenance for loss of time from work due to other disabilities?
>
> A. I would not distinguish say a complication of pregnancy, say heart disease in pregnancy, from heart disease in non-pregnancy or heart disease any place else.
>
> Q. In terms of needing to have income maintained and be home without financial worry, be at home or hospitalized?
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> A. At most I might say there would be more reason in pregnancy to the extent that the pregnant person must at least have enough income to feed the unborn child or to get good nutrition. So I would say that here it is not just a question of personal recuperating, it is also a question of the quality of the product that one is building at that time, namely the child.

Dr. Hellegers further stated that a deficient diet could adversely affect her future offspring (*Gen. Ry.* Tr. 166-170, 178-183, 203-204; *Gilbert* Tr. 265-288, 334-339). Dr. Hellegers called attention to the fact

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[72] In 1967, 61% of the working women had husband who earned less than $7,000 per year. *1969 Handbook on Women Workers*, Women's Bureau Bulletin 294, U.S. Dept. of Labor, p. 34.

that a deficient diet for even the last two or three months of pregnancy in a person who theretofore had a high protein diet could produce increased infant mortality and prematurity as was the experience in Holland in the winter of 1944-1945 when supplies were cut off by Nazis (*Gen. Ry.* Tr. 181-182; *Gilbert* Tr. 286-287). Dr. Hellegers pointed out that the smaller birth weight reflecting a deficient diet indicated prematurity and often imposed a heavy burden on society because such a child was often handicapped by mental retardation, cerebral palsy or other central nervous system defects. (*Gilbert* Tr. 265-266, 286-287, 334-337). Dr. Hellegers cited (*Gen. Ry.* Tr. 166-184; *Gilbert* Tr. 265-267) studies which showed a positive correlation between low income and infant mortality and between low income and smaller weight at birth. U. S. Dept. of Health, Education and Welfare, National Vital Statistics System Series 22, No. 15, *Infant Mortality Rates, Relationship to Mothers' Reproductive History*, p. 25, Table 16 (Government Printing Office, April 1973); National Vital Statistics System Series 22, No. 8, *Variation in Birth Weight, Legitimate Live Births*, p. 23, Table 11 (Government Printing Office 1968).

In addition to the effect on diet, the effect in quality of medical care is equally dramatic. Dr. Hellegers testified that "the quality of the medical care one can obtain is I think a function of income in the United States" (*Gen. Ry.* Tr. 201; cf. *Gilbert* Tr. 264-265, 285-287) that the effect of "the inability to receive private and experienced care "means the difference between" that kind of care that comes with a physician having spent many years in practice" and "being attended to by a medical student or somebody of lesser experience" (*Gen. Ry.* Tr. 202).

The women who are in the work force today are there because they need the income from their paycheck to survive. Seventy per cent of the women in the labor force are either single or have husbands making less than $7,000 a year. To quote the Department of Labor, "Millions of the women who were in the labor force in March 1972 worked to support themselves or others. This was true of most of the 7.5 million single women workers. Nearly all the 6.2 million women workers who were widowed, divorced, or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. In addition, the 4.1 million married women workers whose husbands had incomes below $5,000 in 1971 almost certainly worked because of economic need. Finally, about 3 million women would be added if we take into account those whose husbands had incomes between $5,000 and $7,000—incomes below the $7,200 estimated by the Bureau of Labor Statistics for a low standard of living for an urban family of four."[12]

The combined necessity of women to work, and the discrimination because of sex which women encounter in the work place, has resulted in extensive poverty. The *1970 Report on the President's Task Force on Women's Rights and Responsibilities* entitled, "A Matter of Simple Justice," U. S. Government Printing Office, 1970, p. 18 stated:

> Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is $7,396, of Negro men $4,777,

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[12] U.S. Dept. of Labor, Employment Standards Administration, *Why Women Work*, p. 1, June 1973 rev.

of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.

Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

To update the figures above, in 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U. S. Dept. of Commerce, *Current Population Reports, Consumer Income,* Series P-60, No. 87, June 1973. Women headed 2,100,000 impoverished families. U. S. Dept. of Labor, Employment Standards, Women's Bureau, *Facts About Women Heads of Households and Heads of Families,* April 1973, p. 8.

With these millions of women dependent for their living on their jobs, the fact that it is childbirth that sends them to the hospital and stops their pay check, seems to afford not the slightest basis for saying that they are not sick whereas whatever it is that keeps a male at home is sickness.

It will be recalled that the second of the two-fold purposes of the California disability system was to "avoid the necessity for resorting to costly relief programs" (p. 32, *supra*). The failure to pay benefits to women disabled by childbirth, forces them to go on

relief, thus defeating this purpose of the legislation. The plaintiff, Aiello, was on welfare, according to her Affidavit, filed in this case. In each the *Stromberg-Carlson* case (Betty Williams, *Stromberg* Tr. 260-264) and the *Gilbert* case (Sherrie O'Steen, *Gilbert* Tr. 224) one of the complainants had been forced to go on welfare when her income stopped due to pregnancy. Betty Williams had to abandon her private physician and accept delivery as a welfare patient (*Stromberg* Tr. 2). Sherrie O'Steen testified without contradiction that before her first welfare check arrived she had no money to pay her electric bill, with the result that her electricity was cut off leaving her and her two-year old daughter without light, heat, refrigeration or cooking facilities (*Gilbert* Tr. 224-226).

This Court in recent years has had several cases before it where the facts disclosed an indigent pregnant woman, *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969); *Doe* v. *Bolton,* 410 U.S. 179, 93 S. Ct. 739, 744 (1973). See also the recent series of cases in the federal courts in which the issue has been whether the unborn fetus is a person within the meaning of the Aid to Families With Dependent Children Act, 42 USC 601. *Jone Doe* v. *Lukhard,* No. 73-2179, (4th Cir., February 26, 1974); *Wilson* v. *Weaver,* No. 72-1960 (N.D. Ill. 5-23-73); *Green* v. *Stanton,* Civ. Act. 73-719 (N.D. Ind. 7-2-73); *Harris* v. *Mississippi State Dept. of Public Welfare* (N.D. Miss., August 15, 1973); *Alcala* v. *Burns,* 42 L.W. 2111 (S.D. Iowa, Aug. 29, 1973); *Carver* v. *Hooker,* Civ. Act. 73-87 (D.C. N.H., 11/30/73); *Whitfield* v. *Minter,* Civ. Act. 73-3051 (D.C. Mass. 12/26/73); *Stuart* v. *Kanary,* Civ. Act. 72-452 (N.D. Oh. 12/27/73); *Wisdom* v. *Norton,* Civ. Act. 15,906 (U.S. D.C. Conn. 1/3/74).

Additional purposes appear in the legislative history developed when Congress enacted the first federal temporary disability program in 1946, namely that for railroad workers (see pp. 35-36, *supra*). The primary purpose of that program was also to provide employees with insurance against financial problems during periods when they were disabled from working. The hearings on the railway disability bill pointed to the conditioning of benefits on the securing of medical care as an addition purpose of temporary disability plans designed in the same way as the California plan is designed. This purpose is equally applicable to pregnancy-related disabilities. Plans such as that adopted by the California legislature which condition the receipt of benefits on a physician's certification of disability encourage employees to receive medical attention as soon as possible.[74]

With respect to pregnant women, encouraging them to secure medical care by requiring a certificate from a physician before they can draw disability is obviously of great importance to her health, and could minimize any disabilities she might suffer. Thus, a third purpose of temporary disability plans is to minimize the severity of an employee's disability. This is also a recognized purpose of the social security programs in Europe as applicable to pregnant women. See Dr. Hellegers, *Gen. Ry.* Tr. 251-253.

Another purpose of sickness and accident plans is to foster higher employee morale, better worker-manage-

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[74] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., at 286, hereinafter Hearings on H.R. 1362.

ment relations and increased productivity.[75] Dr. Hellegers testified (*Gen. Ry.* Tr. 164-165):

> Q. Do the disabilities which a woman suffers from a normal childbirth, say if she's going to be disabled for a certain number of hours or days, do these disabilities differ from disabilities from other causes in any way which would make sick leave with pay any less reasonably related to increased production in cases of absence from work due to childbirth than in the case of others?
>
> A. I would say, no.

This relationship between employees' well-being and employers' self-interest was recognized by Congress. The railroad workers' disability insurance was viewed as an aid in maintaining an employment relationship that would encourage employees to return to the employer upon recovery.[76]

The insurance industry generally does not regard pregnancy as creating an uninsurable risk when it comes to paying the hospital or doctor's bills for the prenatal care, delivery and post partum care, with respect to wives of male employees as well as in instances of female employees.

The *1964-1966 National Natality Survey* showed that 59 per cent of mothers of legitimate live births during 1964-1966 "had insurance to pay the physician bills during pregnancy, the physician bills for delivery of the baby, or the bills for hospital care at the time of delivery." Vital and Health Statistics Series 22,

[75] National Industrial Conference Board, *Preparing for Collective Bargaining*, Studies in Personnel Policy, No. 172, p. 128 (1959); Donna Allen, *op. cit.*, pp. 23, 31, 34, 35.

[76] Lester P. Schoene, representing the Committee of the Railway Labor Executives' Assn., Hearings on H.R. 1362 at 1112.

No. 12, *Health Insurance Coverage for Maternity Care: Legitimate Live Births, U. S. 1964-1966* (U. S. GPO 1971), p. 5.

Certainly pregnancies are no more involuntary and insurable for hospital and doctor bills than for sickness and accident benefits. Actuary Jackson so admitted (*Gilbert* Tr. 377).

There is nothing in the language of the statute or in its legislative history to suggest that only the "unexpected" disability was to be covered,[77] or only the less expensive instances of disability.[78]

The medical profession has repeatedly supported the position that disabilities arising from pregnancy should be covered equally with other disabilities under a temporary disability insurance plan. See the 1912 participation of a committee of the American Medical Association in the preparation of a model health insurance act covering income maintenance during disabilities due to childbirth (pp. 23-24, *supra*). The Rhode Island Medical Association's protest that it violated true social security principles to amend the Rhode Island Temporary Disability Act to place a lower maximum on the number of weeks of benefits payable to women disabled by childbirth than were payable in other disabilities (pp. 30-31, *supra*).

Dr. Hellegers testified in both the *General Railway Signal case* (Tr. 161-166, 224-229) and the *Gilbert* case (Tr. 261-265, 284-285) and Dr. Forres testified in the *Gilbert* case (Tr. 41-44) in answer t

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[77] Brief of Appellant, pp. 8, 19, 25-26; Brief of GE as amicus pp. 6-9, 15-16, 20-23.

[78] Brief of Appellant, pp. 8, 13-16, 30-34; Brief of GE as amicus pp. 9, 22-27, 28-31; Brief of M&M as *amicus*, pp. 41-47.

a hypothetical question setting forth the purposes for which temporary disability payments were made, that there was no rational basis for distinguishing between normal childbirth or other disabilities connected with pregnancy and other disabilities.

1. The cost figures submitted by the State of California and various amici are grossly exaggerated

There are seven obvious respects in which the figures submitted by the State of California, appellant and various *amici* overstate:

(1) The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;

(2) Periods of absence based on abnormal or complicated pregnancies are included;

(3) The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;

(4) It is also assumed that physicians will certify women as disabled without regard to the truth;

(5) Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;

(6) The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;

(7) The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and accordingly draw benefits at the bottom of the scale of benefits.[79]

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[79] Points 1 and 5 insofar as the relevant data is in the public domain, are covered in the brief *amicus curiae* of the AFL-CIO and Points 1, 3, 4, 6 and 7 are covered in this brief to the extent that the relevant data is in the records of cases to which the IUE is a party.

(a) There are no known statistics with respect to the average period of disability due to pregnancy and childbirth

The cost estimates in the brief of GE as *amicus*, pp. 25-27, are based on the assumption that the average length of disability will be many times longer than any evidence supports. According to GE, Actuary Jackson based his figures on an average disability period of 15 weeks (GE Br. as *amicus*, p. 25); Baille based his figures on an average period of either 20 or 30 weeks (*id.*, p. 25, fn. 18). Thus these estimates are based on the assumption women disabled by pregnancy will be absent from work for long periods of time. There is no experience upon which it can be estimated how long women will be absent if they are permitted by employers to work as long as they are medically certified as able and to return as soon after childbirth as they are cleared by their doctors for resumption of work.

Actuary Jackson, called as an expert by GE in the *Gilbert* case, and one of the actuaries whose estimates GE cited to this Court (GE Br. *amicus*, p. 25) testified (*Gilbert* Tr. 387):

> I assumed that the average benefit payment would run 13 weeks under 13-week plans, 23 weeks under 26-week plans and 30 weeks under 52-week plans.

Actuary Jackson admitted (*Gilbert* Tr. 391-392) that the only factual data he had with respect to the length of absence of pregnant females was the exhibit handed to him by counsel for GE reflecting GE's experience, which are quoted by GE (Br. *amicus*, p. 25, fn. 19). These figures are for the years 1970 and 1971. At that time GE required mandatory leave. The record in the *Gilbert* case contains numerous employee handbooks and notices to employees stating that a pregnant employee must take a maternity leave at the beginning of the sixth month of pregnancy in some plants and at

later fixed dates of the pregnancy in other plants and not return until six to eight weeks after childbirth.[80]

The fact these figures reflect enforced periods of absence unrelated to inability to work make it clear that GE's estimated costs are many times too high. The medical experts, those called by GE, Stromberg Carlson and General Railway Signal, as well as by the female plaintiffs in these cases all agreed that 85 to 95% of women could work until the onset of labor and return within two to six weeks thereafter, with three weeks the average time (*Gilbert* Tr. 11, 20-22, 65, 239-241, 244-256, 583; *Stromberg Carlson* Tr. 108-110, 130, 117-118; *Gen. Ry.* Tr. 144-155, 217). Cost figures based on 13, 20, 24, 25, 30 or 32 weeks off are obviously grossly overstated.

The contention that GE's experience "regarding the duration of pregnancy absences prior to delivery" supported Actuary Jackson's figures, (GE Br. as *amicus*, p. 25, fn. 11), also brings into the picture irrelevant data because the periods of leave included leave

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[80] E.g., the employees at the Salem, Virginia plant of GE had never been told that the latest employee handbook (*Gilbert* Plaintiffs' Ex. 17B) containing a mandatory leave provision requiring the beginning of leave not later than the end of the sixth month, was no longer in effect (Pre Trial Stip. No. 23). At Murfreesboro, Tenn., under date of January 15, 1973, GE informed employees maternity leave had to begin not later than the beginning of the 6th month (*Gilbert* Plaintiffs' Ex. 18, Pre Trial Stip. No. 26). (Plaintiffs' Ex. 48, 49, 52, 53, 54, Pre Trial Stip. §§ 24-25, 27; Answer of GE to Interrogatories 68-69, Exh. B). Since only 5% of the babies are born on the expected due date, although a larger percentage are born on that date than any other date (Dr. Hellegers, *Gen. Ry. Tr.* 263), the distribution of births set out in GE's Br., *amicus*, pp. 25-26, fn. 19, reflects the combination of GE's mandatory leave policy and the natural distribution of birth dates, together with some complication cases.

due to abnormal or complicated pregnancies as well as mandatory maternity leave.[21] The figures quoted (GE Br. *amicus*, p. 25, fn. 19) include absences due to all the various abnormalities and complications of pregnancy, excepting only abortions, miscarriages and Caesarian sections. The figures on which the percentages were based appear in the record in the *Gilbert* case in Revised Answer by GE to Plaintiff's Interrogatory No. 45, which shows "Pregnancy Absences Prior to Delivery—Total Company—Normal Delivery". In prior responses to Interrogatory No. 45, GE had explained that the term "normal delivery" excluded only miscarriages, abortions and Caesarian birth.

(b) Claim abuse and malingering is no more likely to occur with respect to pregnancy-related disabilities than other disabilities

In arguing that the cost of covering pregnancy-related disabilities is so great as to afford a reasonable basis for their exclusion, the appellant (Br., pp. 19-20, 32-35), GE (Br., *amicus*, pp. 9, 25) and M and M (Br., *amicus*, pp. 6-9, fns. 5-9) make, as one of their contentions, the point that allegedly women would abuse the right to disability pay to such an extent as to bankrupt the system. It is dubious that this contention is at all relevant to the issue remaining in the case now that the state of California has decided to cover all abnormal and complicated cases. The normal pregnancy presents no opportunity for malingering. Once there is

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[21] GE as *amicus*, Br. p. 19, correctly summarizes the testimony of the expert medical witnesses in the *Gilbert* case that approximately 10% to 15% of women have complications associated with pregnancy (Tr. 56-57, 295). But not all such complications require a woman to stop work (Tr. 24): only 1% to 2% of the women with complications have those that could be classified as major (Tr. 57) and of this very small percentage only some require hospitalization (Tr. 58).

malingering, the abnormal or complicated is by definition present and already covered.

Actuary Jackson, whose estimates of cost are cited by GE in its brief *amicus* to this Court (pp. 23-27), insisted that costs of covering pregnancy-related disabilities would be greatly increased because malingering in this type of claim would be particularly difficult to control (*Gilbert* Tr. 350-353, 357-359). Actuary Jackson admitted on cross-examination that his testimony in this regard was not based on a single instance of claim abuse in connection with a claim for benefits during a pregnancy-related absence (*Gilbert* Tr. 366-367; see also Tr. 357-359). Nevertheless, in estimating the cost of including pregnancy-related disability coverage under presently existing plans of temporary disability benefits in private industry, he made the assumption that every woman who worked under a plan which provided disability benefits for 16 or 18 weeks would claim benefits for the full 16 or 18 weeks (*Gilbert* Tr. 400-401). On cross-examination Actuary Jackson testified (*Gilbert* Tr. 400-401):

> Q. You made no assumption that the woman would work up until she was actually disabled, did you?
>
> A. No. I rather went at it from the other end and assumed an average benefit period for the purpose of determining an average.

He also assumed the woman would get a physician's certificate that she was disabled for the full period. He testified on cross examination (*Gilbert* Tr. 400-401):

> Q. But you had no figures, no data that would show you whether it is 16 or 18 weeks represented a period that she claims she was unable to work and that it was not affected by the employer re-

quiring her to go off when she was able to work. You don't know which that figure represents. You have no basis for thinking the 16 to 18 weeks represented a period that she was actually medically disabled to work, that the doctors would certify she was unable to work?

A. In essence what I have assumed is that with the benefit plans we have here that these will be the approximate amounts of claim costs under those plans, and if under those plans in order to obtain a benefit an individual needs a physician's statement then that assumption is inherent in my figures.

Q. The 16 to 18 weeks, did you know whether that represented any physician's certification that she was disabled for 16 to 18 weeks?

A. No.

Q. But under the plan she would only get paid for the period she was—had a certificate from the company—from the physician that she was disabled—wouldn't she?

A. Well, you have more faith, perhaps, in the fact that these plans are going to operate the way they are supposed to than I do. As an actuary I am a little suspicious, and perhaps would be inclined to assume that if she has been out for 16 to 18 weeks that in the future if 50% of pay is paid to her during that period she will be out 16 to 18 weeks plus a few more.

The contention that women will malinger or otherwise abuse the right to disability benefits is baseless. First, except with respect to women in the lowest bracket covered, $75 to $524.99 per quarter, the disability benefit is so small compared with the wages which a woman earns that rarely can she afford the loss of the difference between her regular earnings and the small disability benefit for which she would be eli-

gible if she went on disability leave.[22] Actuary Jackson testifying for GE in the *Gilbert* case, described the differential between wage rate and benefits as one of the controls designed to reduce or discourage malingering: "Use of a limitation on the amount of benefits, such as 60 percent of pay or 65 percent of pay" provides a financial incentive to return to full time employment and get full pay" (*Gilbert* Tr. 353).

Second, when questioned on cross examination about malingering, Dr. Hellegers volunteered that, "One be-

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[22] The median earnings of women in California in 1969, the last year for which figures were available, as shown by the Department of Commerce, *1970 Census of Population, Characteristics of the Population*, issued April 1973, with respect to the State Standard Metropolitan Statistical Area of 250,000 or more, "Occupation of the female experienced civilian labor force" was $4,237. This places the average woman in the quarterly bracket of earnings $1050 to $1074.99, for which the weekly disability benefit is $47, or $611 for 13 weeks. Thus the average woman would lose $448 a quarter by going on disability. And but for the sex discrimination which results in her average wages being only 57 per cent of her male counterpart, if she earned the same as the average male $9,728, her weekly disability benefit would be $109 a week and her loss by going on disability leave for 13 weeks would be $1,015. A research project financed by the Department of Labor, investigating job satisfaction generally and without any focus on sex discrimination showed that considering the education and experience of female employees as compared with male employees, "the average woman should have received 71% more than her current income to make her income equivalent to a man with the same scores in the achievement variables" (p. 246); "The mean difference between men and women in observed incomes, without the imposition of controls was $4,372. Only $914 of this difference could be attributed to the achievement factors measured. The remaining—$3,458—represented, in part at least, a disparity caused by illegitimate or discrimination factors (at pp. 251-252). Teresa Levitan, Robert T. Quinn, and Graham L. Staines, "Sex Discrimination Against the American Working Woman," *American Behavioral Scientist*, Vol. 15, No. 2, p. 237 (November-December 1971).

gins to see in Europe where various schemes of this nature exist, that women have a tendency to continue work even though they have an opportunity to participate in maternity benefit schemes * * * because they find it a pain in the neck not to do so". (*Gen. Ry. Sig.* Tr. 242).

Third, if there would be any difference in this respect between non-pregnancy and pregnancy-related claims, the evidence indicates there would be less rather than more malingering in making pregnancy-related claims. Dr. Forrest, testifying in the *Gilbert* case (Tr. 46) diagnosed malingering as a psychological problem with no sex differentiation. Both Dr. Forrest (*Gilbert* Tr. 46-47) and Dr. Hellegers (*Gilbert* Tr. 270-271, 314, 338) were emphatic that there is no aspect of pregnancy which would contribute to malingering. Dr. Forrest in this connection volunteered that laymen might assume women would "encourage a little bit of sympathy" towards "protecting motherhood", but it was his considered medical judgment that this is not so (*Gilbert* Tr. 47).

Fourth, Dr. Hellegers pointed out (*Gen. Ry.* Tr. 243) (*Gilbert* Tr. 270-271) that from a medical point of view, malingering in pregnancy was much more difficult to get away with. He testified in the *General Railway Signal* case (Tr. 243):

> Q. Is it easier to determine malingering in obstetrics than it is in some other field of medicine?
>
> A. There are just so many things that you can malinger about when you are pregnant and we have access to where the action is, the uterus and its contents, much more than internal medicine has access to the pancreas and the liver and the heart and so forth. I mean just simple vaginal

examination eliminates all bleeding and all placental abnormalities you'd have. The pregnancy is much more on the surface of things, if you like, than the kind of things that men malinger about like headaches and urological signs and things that are less obvious. I mean obstetrics is not a very sophisticated or complicated kind of a specialty compared to internal medicine.

And in the *Gilbert* case (Tr. 270-271, 338):

The uterus is an awfully superficial thing, and under the skin. Access to the mouth of the uterus or the cervix is extremely easy. So it would be very difficult to fake those conditions which are peculiar to the uterus and to the uterine contents. Separation of the placenta, I don't think you could fake. Vaginal hemorrhaging is impossible to fake because all you have to do is check and see if the blood is coming or not coming.

So I don't really see where you could—where it would be easier to hide things in an organ that lies right under the skin that you can look at through a speculum than it would be in terms of, you know, whether one's liver was acting up or whether one's ulcer was acting up. It would be considerably more difficult. It would be much more difficult to pick up whether somebody's ulcer was acting up rather than somebody's uterus was acting up because the uterus is a very accessible organ.

* * *

Malingering on the basis of pregnancy as it affects the uterus and its contents is extremely easily picked up because you have access to the organ in that it is so superficial and you have access to find out if there is any bleeding. I don't quite know what it is one would malinger about, but that doesn't mean that a woman couldn't malinger as well on double vision as a man could.

In *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 271, U.S.D.C.W.D.Pa., No. 72-169, February 20, 1974, in denying a motion for reconsideration of his ruling that denial of disability pay violated Title VII, Judge Weber rejected emphatically the contention women will stay home and collect disability pay longer than they are in fact disabled. He stated (7 FEP Cases at 272):

> The court cannot understand why the disability from performing work due to pregnancy and childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries these matters are decided in hundreds, if not thousands, of cases daily.
>
> Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal". The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

(c) The assumption that doctors will dishonestly certify disabilities without regard to the truth is unfounded

The appellant (Br. pp. 32-33) argues that doctors will certify claims of disability for pregnant women

without regard to disability. The cost estimates of Actuary Jackson were admittedly based on the assumption that doctors would certify disability for any period the woman requested (*Gilbert* Tr. 400-401). This assumed a state of dishonesty in the medical profession. There is no basis for assuming such a state exists. If the medical profession fails to appreciate the unethical and illegal character of such conduct, policing by the medical profession itself or law suits against dishonest doctors who aid patients in filing false claims should correct this problem (*Gilbert* Tr. 333). Assumptions about the dishonesty of doctors cannot properly be the basis for greatly exaggerating the costs of the inclusion and then justifying the exclusion on this basis.

(d) The birthrate of women who work is less than the general birthrate

As of June 1972 the number of children of working women as opposed to non-working women varied by age group as follows: [33]

Children ever born per 1,000 women

Women aged	In labor force	Not in labor force
16-24 yr.	210	502
25-34 yr.	1,542	2,401
35-44 yr.	2,724	3,563

There is no available evidence as to how many of the children which these women had accumulated by the age of 35 to 44 group were born as a result of pregnancies which began when the mothers were working.

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[33] U.S. Dept. of Commerce, Series P-20, No. 248, Table 16, 1973.

In estimating costs of covering women, Actuary Jackson corrected only .09 (Gilbert Record, Defendant's Exh. 42, p. 2) to adjust for the fewer children born to women in the work force. The above quoted figures indicate that the correction should have been at least 20%. The correction leaves the figure on birth rate which he used much too high. There is no indication that any of the other calculations relied upon by appellant and amici made corrections based on the markedly reduced birth rate of working women. [84]

(c) The weekly benefit used in calculating costs ignored the fact women get only 60 per cent as much in pay as men and therefore had a lower benefit rate

Throughout the United States women earn on the average only 60 per cent as much as males. [85] In the State of California the gap is even greater. The average female in the last year for which figures are available, 1969, earned only 57 per cent as much as the average male. [86] Based on the median wage rate of a

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[84] The actuarial study by Baille in evidence in the *Gilbert* case (cited GE Br. *amicus* p. 25, fn. 19) shows on its face that he used the average birth rate for the population as a whole and made no corrections for the fewer births to working women. *Gilbert* record, Defendant's Exh. 13.

[85] U.S. Dept. of Labor, Fact Sheet On The Earnings Gap (1973), based on U.S. Bureau of Census, Dept. of Commerce, Population Reports, P-60.

[86] U.S. Dept. of Commerce, 1970 Census of Population, Characteristics of the Population, Vol. 1, Part 6, California, Section 2, issued April 1973, California 6—1773 shows median earnings of males who worked 50 to 52 weeks in standard metropolitan statistical areas of 250,000 or more in 1969 as $9,728. The comparable figure for females (California 6-1841) is $5,637. From the same tables the comparative figures for all earners, not only those who worked 50 to 52 weeks is males $8,552, females $4,237.

full time experienced metropolitan area female in California, the weekly benefit rate under the California Unemployment Insurance Code § 2655 is $47 a week.[87] Actuary Jackson used as the average benefit rate $75 per week (Gilbert Record, Defendants Ex. 42, p. 2). The actuarial study by Alexander J. Baille (cited in GE Br. *amicus*, p. 25, fn. 18) was also computed on an average benefit of $75 per week (*Gilbert* Record, Defendants Ex. 13). This is much higher than the average benefit of $47 per week for the full time experienced female and the $47 is even high because of the large number of female wage earners in California who do not work 50 to 52 weeks and are not in metropolitan centers.

In 1970 the average daily sickness and accident benefit paid by GE to males was $12.33, to females $9.18, in 1971, to males $13.27, to females $9.97[88]

Actuary Jackson in making the cost estimte cited in GE's brief *amicus* (p. 25) did not base his figures on average benefit paid. Rather, he used the "average benefit in force" under the "new plans" listed in the 12th annual survey 1971, Health Insurance Institute (*Gilbert* Tr. 406). Actuary Jackson under cross examination explained his term "average benefit in force" (*Gilbert* Tr. 409):

> Q. These new plans, you have had no experience under the new plans. You are telling us what could be paid, not what was paid?

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[87] See p. 93, fn. 82, *supra*.

[88] *Gilbert* record, Plaintiffs' Ex. 37B, Plaintiffs Fourth Interrogatories to Defendant and Plaintiffs' Exh. 35C, Answers by GE to Fourth Interrogatories 72-75. The figures cited in the GE Br. *amicus*, p. 24, fn. 16 represent cost, not benefit figures.

A. No. We are saying what is the average benefit in force.

Q. How do you figure what is the benefit in force?

A. Well, let me give you an illustration. If a plan is issued and there are 100 people covered and 50 of them have a weekly benefit amount of $40, and 50 of them have a weekly benefit amount of $60, the average benefit in force would be $50.

In addition, Jackson failed to take into account that women earn only 60% as much as men. On cross examination he testified (*Gilbert* Tr. 412):

Q. Did you know when you figured the amount how many employees were at each level, male and female, of the scheduled benefits?

A. No.

Q. You took an average without a female breakdown?

A. That's right.

Therefore, if the average benefits for women were looked at separately, the figure would be substantially lower than the average for both men and women.

2. There is no greater failure of females to return to work after childbirth than the turnover rate of employees of like pay and status

As still another item of cost, appellant (Br. 21, 36), (GE Br. *amicus*, pp. 9, 26-27) and (M & M Br. *amicus* p. 6, fn. 5) argue that half the women having babies will never return to their jobs after childbirth but instead will use their disability pay as severance pay. So far as we have been able to ascertain there are no nationwide figures available as to the number of women

who return to work following childbirth. And if there are such figures, the practice of treating a pregnant woman as a voluntary quit who can only come back as a new employee without seniority and if there is a job available is so widespread as to make meaningless any figures respecting alleged failure to return.

In 1965 a survey of 1,000 employers with respect to maternity cases showed that only two-fifths of the offices granted maternity leaves; three-fourths of the plants (mostly unionized) granted leaves. * * * They tended to require early "retirement" from the working scene—sometimes as soon as a pregnancy was "obvious".[*] Absence of maternity leave usually meant a discharge for absenteeism with loss of all seniority and pension rights. Catherine East, Executive Secretary of the Presidentially appointed Citizens Advisory Committee on the Status of Women, testified as an expert witness for the plaintiffs in the *Gilbert* case and stated that she had done research as part of the duties of her job with respect to practices of industry respecting the return of women to employment following childbirth. She testified that "most apparently had no reemployment rights except preference for vacancies", that "some employers almost designed their practices to force women to quit work at the time they had children" and that these practices "seemed to have been designed by upper middle class men who, you know, were trying to get all women or hoped or seemed to assume all women could

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[*] Prentice-Hall, *Personnel Management, Policies and Practices*, Report Bulletin 25, Vol. XIX, p. 457 (1972); Elizabeth Koontz, then Director of U.S. Dept. of Labor, Women's Bureau, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y. Law Forum, p. 480, (1971).

follow the practices of their wives." (Gilbert Tr. 90-100). She added (Tr. 100):

> I have spoken a great deal to businessmen, including the American Mangement Association Conference, and I always raised this topic when I did. And several of the employers, these are industrial relation experts, they are not just anybody, Vice-Presidents for Industrial Relations or Personnel Directors have asked me shouldn't women be encouraged to stay home? Why should you have policies that would permit them to come back?

Historically one of the earliest and most successful of union efforts on behalf of female members was to secure for them the right to maternity leave so they would have a job to which to return following the birth of a child.[90] However unions were not always successful in securing maternity leave so adamantly did industry insist on its right to terminate female employees when their pregnancy became "obvious".[91]

The IUE had the experience of believing its collective bargaining agreement entitled the pregnant employee not to lose her job simply because of pregnancy, only to find the employer still discharging pregnant employees, so stubborn on the issue as to compel IUE to go to court[92] to secure arbitration of the

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[90] Note the above quotation from Prentice Hall mentions that the employers granting maternity leave were mainly unionized.

[91] The above cited survey conducted by Prentice Hall showed that 80% of the employers tended to require early "retirement" from the working scene—sometimes as soon as a pregnancy was "obvious".

[92] *IUE* v. *Westinghouse*, 55 LRRM 2952 (U.S.D.C.S.D.N.Y. 1964)

issue, and then losing before the arbitrator.[93] The IUE has been a party to several suits brought to secure reinstatement and restoration of pension rights and seniority for women who lost their jobs simply because of discriminatory leave policies respecting pregnacy.[94] The EEOC has numerous reported decisions attesting to the widespread practice of employers of terminating all job tenure when an employee has a baby.[95]

With the present discouragement, if not outright refusal of so much of industry to permit women to return to work, and with supervisors and personnel

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[93] *Westinghouse Electric Corp.*, 45 LA 621 (P. Hebert, Arbitrator, 1965). See also *Kupczyk* v. *Westinghouse Electric Corp.*, N.Y.S.D.H.R., Case No. CSF 15208-67, EPG Par. 26,000B.37 (March 3, 1969) holding that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119.

[94] E.g., *Mann* v. *Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann* v. *Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

The case of *Eberts* v. *Westinghouse Electric Corp.*, U.S.D.C.W.D. Pa., Civ. Action No. 74-113 is a class suit brought by employees complaining of loss of jobs, seniority, pension rights and other benefits becausee of pregnancy.

[95] E.g., EEOC Decision No. 70-360, EPG Par. 6084 (December 16, 1969) EEOC Decision No. 71-413, EPG Par. 6084, 3 FEP Cases 233 (November 5, 1970); EEOC Decision No. 71-562, 3 FEP Cases 233 (December 4, 1970).

managers often discouraging return to work even in companies allegedly following a different policy, any contention that disability benefits constitute severance pay represents another instance of sex stereotyped thinking.

The references to the Illinois Bell Telephone Co. showing a 50% failure to return (Appellants Br. p. 21, fn. 20), is to be read in the light of the pendency of a law suit against that company in which one of the charges is that Illinois Bell Telephone Co. failed to reinstate employees seeking to return to work after childbirth. [96]

The GE experience in 1971, as cited in the GE brief as *amicus* (pp. 26-27, fn. 20) of 1,634 women who returned and 1,147 who did not, reflects a quit rate of women of 40 per cent which is exactly the quit rate at

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[96] Paragraph 7 of Complaint in *Communications Workers of America, AFL-CIO* v. *Illinois Bell Telephone Co.*, USDCNDIll. ED, Civil Action No. 73C-959. The testimony of Teresa F. Pier, Secretary of the Employees' Benefit Committee of AT&T in *EEOC* v. *AT&T*, FCC Docket No. 19143, August 1, 1972, Exhibit 5, pp. 7-8, shows that in April 1971 AT&T advised its Bell companies to delete from leave application forms language indicating there was no guarantee of reemployment, although no guarantee was made since AT&T regarded it was often impossible to get a replacement without promise of a permanent job. See also *EEOC* v. *AT&T*, 6 FEP Cases 643 (USDCEDPa. 1973). The contention (GE's br. *amicus* pp. 13, 45-46) that the fact that the settlement which EEOC approved involving AT&T did not include sick pay for pregnancy disabilities, shows EEOC is not consistently following the EEOC Guidelines, is groundless. The settlement covers only those issues on which AT&T was willing to settle and reserves all others for litigation.

That settlement agreement betwen EEOC and AT&T provided for retention of seniority rights on return from childbirth leave which theretofore had been lost. The Court observed that the union had filed charges on other aspects of pregnancy which were pending and unaffected by the settlement (6 FEP at 645, 663).

GE for all employees [97] and not substantially different from the quit rate of 33.3 per cent for women in California as reported in a study on turnover made by the Merchants and Manufacturers Association.[98]

In *Hanson* v. *Hutt,* Wash. Sup. Ct. No. 42326, decided December 29, 1973, the court, in holding unconstitutional the exclusion from Washington State's Unemployment Insurance Act of pregnant women as sex discrimination in violation of the equal protection clause, rejected the argument that women withdrew

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[97] The plaintiffs in the *Gilbert* case challenged the accuracy of those figures because the figures represented employees who did not return on the date fixed for their return by GE and did not include those who returned more than 8 weeks after childbirth. The plaintiffs by Interrogatories requested figures as to how many of the 1,147 who allegedly did not return were employed by GE subsequent to the birth of their child. Plaintiff's Fourth Interrogatories 63-66. GE in its answers to these interrogatories stated it was in the process of collecting data which would be supplied shortly but was in fact never supplied. The figures with respect to turnover quoted in the same footnote (GE Br. *amicus*, pp. 26-27, fn. 20) represent only a few isolated plants. In its objections to interrogatories (Plaintiffs Ex. 34) GE stated that its overall turnover rate was 40 percent.

[98] Merchants and Manufacturers Assn., Labor Turnover Handbook, 1970, p. 32; "The 1970 M&M Survey revealed that 65.6% (Table III) of the terminations reported were male and 34.4% were female, almost exactly the ratio of the total work force. The California labor force totalled 6,631,000 in 1969 with 4,199,000 males (63.32%) and 2,432,000 females (36.68%). It appears as if sex has little bearing upon the area occupational turnover. Specific industries were affected. However, combined with length of service, sex does indicate some interesting findings (Tables IV-A and IV-B). Approximately one third of the females left their jobs in each of the three periods studied. Men, on the other hand, had a higher rate (40%) in the first three months, and then a relatively lower period of turnover in the three months to one year period (27%)."

from the labor market upon becoming pregnant. The court stated:

> The Appellant has attempted to justify the statutory classification by asserting that pregnant women are not genuinely attached to the labor market. To the contrary, however, all five doctors who testified at the Commissioner's hearing concluded that 90 percent of pregnant women do not suffer from medical conditions that would impair their ability to continue working in their normal occupation. They also testified that most women can return to their jobs between 5 days and 4 weeks after delivery, the exact time depending on the individual woman. There is ample evidence to support the trial court's finding that pregnant women are attached to the labor market and that there is no medical basis in fact for their disqualification.

C. Practices of the Insurance Industry Are Irrelevant to the Issue of Whether Exclusion of Disabilities Arising From Pregnancy From an Otherwise All Inclusive State Temporary Disability Program Discriminates Because of Sex

The alleged practices of the insurance industry to exclude from temporary disability coverage pregnancy-related disabilities is relied upon by GE, *amicus* (Br., pp. 22-27) as demonstrating the rational purpose of California's exclusion. First, it should be pointed out that GE's expert witness, Actuary Paul H. Jackson, testified in the *Gilbert* trial that "most of the major companies will now offer the coverage" for a disability arising from pregnancy including benefits equal in amount and duration to those for any other disability (*Gilbert* Tr. 365). With reference to insurance policies which include as part of a temporary disability program income maintenance for a shorter duration than the period during which benefits for

other disabilities are available, Actuary Jackson estimated that approxiatemly 40 per cent of the existing temporary disability insurance policies provide such coverage (*Gilbert* Tr. 348). Another study containing figures for 1973 shows 64 per cent of workers covered by "paid sick leave" and 26 per cent of the total women workers in the United States covered by at least some "maternity leave with pay" [39] albeit usually for only six weeks.

Actuary Jackson, in his testimony in the *Gilbert* case, did not take the position that the disabilities attendent upon childbirth were not properly insurable risks (Tr. 365-366) but argued that they were more expensive because of the possibility of claim abuse, the ability to plan a pregnancy and the length of time women would be absent on account of pregnancy (see summary of his testimony, GE Br. *amicus*, pp. 25-26). In each respect he admitted he had no factual basis for his testimony. With respect to malingering he testified (*Gilbert* Tr. 358):

> Now there are many statistics that give evidence to the general fact of malingering as it affects disability income insurance in particular as a specific form of coverage.
>
> THE COURT: But not in reference to pregnancy?
>
> THE WITNESS: No.

With respect to duration, he again had no facts (*Gilbert* Tr. 381), but his personal conviction that all women would stay off for the maximum benefit period

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[39] Robert P. Quinn, Thomas W. Mangione and Martha S. Baldi de Mandelovitch, Evaluating working conditions in America, *Monthly Labor Review*, *Vol. 96*, No. 11, pp. 32, 37 (November 1973).

where covered by policies providing 13 weeks (Tr. 379-380, 387); would stay off 23 weeks under 26 week plans, and 30 weeks under 52 week plans (Tr. 387). He based this conclusion on what he described as "the natural tendency" of pregnant women to stay home prior to delivery "to make certain nothing goes wrong" and after delivery "to remain in the home with the child" (Tr. 359). Actuary Jackson relied on "my own personal experience * * * I have had perhaps a dozen secretaries have babies and leave" (Tr. 402).[100] He stated that the incentive of "furtherance of his career" by getting "back to work because he is competing with others" (*Gilbert* Tr. 352) does not apply to pregnancy-related disabilities (*Gilbert* Tr. 352-354).

These "subjective assumptions and traditional stereotyped misconceptions"[101] and "romantic paternalism"[102] have shaped women's exclusion from temporary disability benefits throughout the American experience. We have already mentioned GE's proud pioneering in 1925 with the introduction of temporary disability benefits in the American industrial scene,

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[100] The statement in GE's amicus brief (p. 25, fn. 19) that GE's experience with respect to the duration of disability leave for ordinary disability claims averaged two weeks and for maternity claims 15 weeks supports Actuary Jackson's testimony is misleading. GE's experience as to length of time women are off for pregnancy was the only specific data to which Jackson could point as the source of his conclusion as to duration of pregnancy leave (Tr. 391-392) and he was unaware either GE or other employers were often accountable for the early leaving date. He did not know about their mandatory leave rules (Tr. 391, 393). Also see pp. 88-89, *supra*).

[101] *Schultz* v. *First Victoria Natl. Bank*, 420 F.2d 648, 65[illegible] (5th Cir. 1969).

[102] *Weeks* v. *Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 23[illegible] (5th Cir. 1969).

when this "man-run company",[103] to use the words of its then president Gerard Swope, did not offer coverage to women on the theory "that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."[104]

Actuary Jackson portrays the insurance industry as having shaped its policies respecting disability insurance for women on the concept that women, rather than men, had family obligations which interfered with their attachment to their work. In *Martin Marietta* the employer's practices based on this same concept were found to constitute discrimination because of sex in violation of Title VII, *Phillip* v. *Marietta Corp.*, 400 U.S. 542 (1971), involving the refusal of a private employer to employ mothers of pre-school age children.

The discriminatory character of the pregnacy exclusion was recognized by Grant M. Osborn, *Compulsory Disability Insurance in the United States* (published for the S.S. Huebner Foundation for Insurance Education, 1958), p. 117:

> "To deny benefits in all cases of pregnancy constitutes discrimination against a significant group in the labor force. Many justify such action with the argument that female employees, even exclusive of pregnancy benefits, receive relatively larger share of benefits than do male employees.

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[103] Gerard Swope, *Management Cooperation with Workers for Economic Welfare*, The Annals of the American Academy of Political and Social Science, Vol. 154, pp. 131, 132 (March 1931).

[104] David Loth, *Swope of GE: Story of Gerard Swope and General Electric in American Business* (Simon Schuster, N.Y. 1958) p. 155; cf. Swope in the Annals, fn. 103, *supra*.

However, to carry this argument to its logical conclusion would justify reducing benefits to low-income and upper-age groups, who are in a similar position."

With respect to the assumption in the above quotation that females, even exclusive of pregnancy benefits, receive a relatively larger share of benefits than male employees, the studies show that when male and female employees are compared on the basis of age and wage rate, the women have as good and in some instances lower share of benefits. See brief for AFL-CIO as *amicus*, pp. 29-33.

Reliance upon the practices of the insurance industry serve to demonstrate that the exclusion is based on discrimination because of sex rather than any rational purpose. As the testimony of Actuary Jackson demonstrated, the only aspects of childbirth which made its coverage for disability benefits allegedly unduly expensive, were stereotyped concepts. The actual physical disability of a woman during childbirth does not differ materially from males disabled by accidents or ailments which require hospitalization, anesthesia, surgical incision, suturing and recovery. All of the differences, which Actuary Jackson insisted existed rested on his concept that a woman because of her mental attitudes about motherhood would behave differently from a man who had physical disabilities paralleling the physical disabilities of the female. Actuary Jackson thought it "only natural" that she will want to stay home before the baby is born to be sure her future child suffers no harm before it is born (*Gilbert* Tr. 359). Actuary Jackson also thought it was "natural" for her to want to stay home with the baby after it is born (*Gilbert* Tr. 359). All of his testimony describing the position of the insurance in-

dustry rested on supposition about the attitudes of women rather than on experience (pp. 107-108, *supra*).

In every respect such attempts to justify a different treatment for the disabilties of childbirth are based on the same reasoning as motivated *Martin-Marietta* in refusing to hire mothers of pre-school age children. The supposition that the pregnant woman will let her attitude towards motherhood keep her home from work when she is not disabled or that the employer may impose its notions of what is good for her and her baby, parallel those stereotypes respecting the hiring of mothers with pre-school age children which this Court held constituted unlawful sex discrimination in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971).

Practices of the insurance industry[105] based on stereotyped thinking about pregnant women and new mothers cannot serve to excuse state action irrationally based on the same stereotypes.

III. DENYING DISABILITY BENEFITS FOR DISABILITY DUE TO CHILDBIRTH WHEN DISABILITY BENEFITS ARE PAID FOR PRACTICALLY ALL OTHER DISABLING CONDITIONS CONSTITUTES DISCRIMINATION BECAUSE OF SEX WITHOUT ANY LEGITIMATE STATE INTEREST IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

The court below held that "the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," and hence violated the

[105] See Susanne Stoiber, Insured except in Case of War, Suicide and Organs Peculiar to Females, Ms. June 1973, p. 114. In recent investigation of insurance practices, the discriminatory treatment of females by insurance companies was described in Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, 92nd Cong., 2d Sess., pp. 5-6, 93-99.

equal protection clause. The court pointed out that (App. A, p. 9):

> Pregnancy is clearly a unique human condition: only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program.

The only other case holding that state action which denied sick pay to a woman disabled by pregnancy, violated the equal protection clause is *Bravo* v. *Board of Education of Chicago,* 345 F.Supp. 155, 159, 4 FEP Cases 994, 997-998 (N.D. Ill. 1972). That case involved denial by a school board of such pay to teachers. The court stated (345 F.Supp. at 159):

> Teachers on illness leave are allowed to draw pay for their accrued "sick pay" days; pregnant teachers are not. * * * The Board has offered no reason for these differences in benefits between teachers who are ill and those who are pregnant. * * * For purposes of sick pay, * * * the Board will be further directed to treat maternity leaves as leaves due to illness.

In *Wetzel* v. *Liberty Mutual Ins. Co.,* 7 FEP Cases 34 (USDC WDPa. 1974), holding that exclusion of pregnancy-related disabilities from temporary disability benefits violates Title VII, the Court followed and quoted the court below.

Similarly, in *Dessenberg* v. *American Metal Forming Co.,* (USDCND Oh.ED), Case No. C-72-487, Judge William J. Young on October 9, 1973, held that the prohibition on discrimination in employment because of sex contained in Title VII required that

women disabled by pregnancy be provided with "sick pay to the same extent that sick pay is provided for other temporary disabilities."

In *Goodyear Tire & Rubber Co.* v. *Local Union No. 200, United Rubber Workers,* 6 FEP Cases 1069 (Ct. of Common Pleas of Auglaize County, Ohio 1973), the court in enforcing an arbitration award, held that the arbitrator had properly applied Title VII to require the employer to eliminate the six weeks limitation on sick pay for pregnancy-related disabilities where sick pay was payable for 52 weeks for other disabilities.

The singling out of pregnant women for exclusion from unemployment insurance benefits has recently been held to constitute a "classification based on sex" without a "compelling state interest" and hence violative of the equal protection clause. *Hansen* v. *Hutt,* DLR 1/9/74 (No. 6), p. A-8 (Wash. Sup. Ct. No. 42826). Accord: *Vick* v. *Texas Employment Comm.,* 6 FEP Cases 411, 413 (USDCTex. 1973) "such a natural and necessary female condition cannot be the basis for categorical discrimination in light of *Phillips*"; *Jordan* v. *Meskill* (USDCConn., Civ. Act. No. 15,671, order of Judge Robert C. Zampani, June 26, 1973); *Orner* v. *Bd. of Appeals, Employment Security Administration,* 5 CCH Unemployment Ins. Reporter, Md. ¶ 8387, p. 23,544 (Superior Ct. of Baltimore City, Case No. 132592, 1973) no "compelling reason to treat pregnancy in a different manner from any other temporary disability common to both men and women".

In numerous of the cases involving mandatory leaves for teachers the courts placed their ruling on the ground, as stated by Judge Merhige in *Cohen* v. *Ches-*

terfield County School Bd., 326 F.Supp. 1159, 3 FEP Cases 526, 528 (E.D.Va. 1972), *rev'd.* 474 F.2d 395 (4th Cir. 1973), *rev'd* in opinion in *Cleveland Bd. of Ed.* v. *LaFleur*, Nos. 72-777 and 72-1129 this term, decided January 21, 1974:

> Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.

Accord: *Green* v. *Waterford School Board*, 473 F.2d 629 (2nd Cir. 1973); *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973); *Bravo* v. *Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972); *Health* v. *Westerville Board of Education*, 345 F.Supp. 501, 505 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District*, 340 F.Supp. 438, 443; *Pocklington* v. *Duval County School Board*, 345 F.Supp. 163 (N.D. Fla. 1972); *Cerro* v. *East Stroudsburg Area School District*, 299 A.2d 277, 5 FEP Cases 480 (Pa. Sup. Ct. 1973).

The foregoing cases have uniformly rejected the same arguments as are advanced here by appellant and *amici* supporting appellant that there are unique aspects attendant upon pregnancy which require different treatment.

In the instant case, due to the fact that the State of California has now by judicial decision and amendment of the law, decided to pay disability benefits for all abnormal pregnancies or complications of pregnancy, the issue here is even narrower. Is there any

state interest which justifies singling out periods of disability due to the normal delivery of a baby, and recovery therefrom, from all other periods of disability for the purpose of denying disability benefits during that period?

The essence of the argument of appellant and *amici* supporting appellant is that there are differences between absences resulting from normal childbirth and other absences due to a disabling condition which establish that the different treatment does not constitute discrimination because of sex. We have shown above that none of the alleged differences are relevant to the purposes of the State of California in providing temporary disability benefits. In all respects the woman disabled by childbirth is just as much, if not more, in need of the benefits as any person disabled by any other condition. The nature of the disability is in no way relevant to the need. Her loss of the usual income from her job as a result of a physical disability differs in no wise from the loss of income of any male disabled by a condition, peculiar to males, who draws benefits. The attempts of appellant and *amici* to establish that we must look beyond the comparison of actual physical condition and rely on assumed difficulties with disability benefits for childbirth such as claim abuse, malingering, failure to return after childbirth, all invoke stereotypes to predict women as a group behave differently with respect to a disability from childbirth than men behave respecting any accident or ailment involving similar hospitalization, anesthesia, surgical incision, suture and recovery. The assumption mothers-to-be and new mothers will be less attached to their jobs than males, constitutes exactly the same type of sex discrimination as was present respecting mothers

of pre-school age children in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971).

The imposition on the welfare system which results from the failure to provide benefits during periods of disability from childbirth is the same as that which would be imposed on the welfare system but for the payment of benefits for other disabling conditions.

Where males and females are treated differently with respect to aspects of their employment, without any relevant basis for the difference, sex discrimination is present.

The only state interest is in the avoidance of cost. As we have demonstrated (pp. 87-100, *supra*), the cost of including disabilities arising from normal childbirth would appear to be only a minor fraction of the figures advanced by appellant and *amici*. But even assuming the cost figures suggested, the decisions of this Court hold that cost alone cannot save state action discriminating because of sex from the interdiction of the equal protection clause. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Compare *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County*, 42 U.S.L.W. 4277, 4281 (February 26, 1974).

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment below should be affirmed.

Respectfully submitted,

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